THE RULE
OF THE
LAW OF FIXTURES.

ARCHIBALD BROWN.

3s. 6d.

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LAW OF FIXTURES,

BY

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PREFACE.

"THE Rule of the Law of Fixtures," is an attempt to gather up in one manageable formula all the numerous factors or elements requiring to be considered in advising upon modern cases; it also attempts to arrange these factors, or elements, in the order of their relative importance. The difficulty which I felt, or have felt, personally, in giving my opinion upon the questions regarding Fixtures which have been submitted to me, has been the occasion of my writing this work, the cardinal defect of the existing treatises upon the subject appearing to me to be their neglect to point out with sufficient, or any, clearness, the measure of that relative importance; and my rule, therefore, if it should be found to possess any substantial value, other than, or beyond, the personal value which it has, and must have, to myself, will be found valuable principally in this respect—that it subordinates in the statement what is subordinate in the reality. I have been comforted to find a corroboration, or justification, of my mode of handling the subject, in the recent judgment of the Lord Chief Baron Kelly, in the case of *Climie* v. *Wood*, cited, and in part set forth, on pages 45-6 of this work; but I adopted my historical method at a time when I was unaware of that decision, and from a pure desire to substitute for my own personal authority, and for the ingenuity of the present, the laboured wisdom and the impersonal authority of the past.

Aug. 7th, 1871. ARCHIBALD BROWN.

3, OLD SQUARE,
LINCOLN'S INN, W.C.

TABLE OF CASES.

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ADDENDA.

P. 11, line 5 from bottom, after "*Lawton* v. *Salmon* (1 H. Bl., 259 n.)," add, "decided in 22 Geo. III."

P. 13, line 10 from top, after "*Fisher* v. *Dixon* (12 Cl. and Fin., 312)," add, "decided in 1845."

P. 14, line 11 from bottom, after "(quoted *supra*)," add, "decided by Comyns (C.B.), prior to 1743."

P. 15, line 13 from bottom, after "21 Hen. VII.," add, "7 Year Book, 264."

P. 25, between the paragraph ending "set forth," and the paragraph beginning "From the two cases," insert the following paragraph: –

With regard, however, to this apparent compromise in the law of *distress*, it has been represented to me by a solicitor of experience in the matter, that the prevalent tendency at the present day is to extend the landlord's right of distress to all fixtures of whatever sort which are removable by the tenant during his tenancy, or which are leviable upon an execution issued against him, it being considered only right to put the landlord upon at least a level in this respect with the execution creditor, and so to secure him again in his old and most just rights as against the latter. This apparent return to the old law is, in reality, an inversion of that law, all fixtures of the modern sort being (or at least threatening shortly to become) distrainable and leviable without distinction, and the more active or diligent of the two disparate claimants being left to have the better of the other.

P. 34, between the paragraph ending "operation" and the paragraph beginning "It remains," insert the following paragraph :—

It may be well to quote here in this relation, the further case of *Birch* v. *Dawson* (2 A. and E., 37), decided in 1834, where, under a bequest to A of a certain leasehold messuage, "with the grates, stones, coppers, locks, bolts, keys, bells, and *other fixtures and fixed furniture therein*," upon trust, to permit B to have the use and enjoyment thereof during her life; and under a further bequest also to A of "the household goods, *furniture*, plate, linen, books, china, wines, and liquors," in the same messuage at the time of the testator's decease, in trust for B absolutely; it was held that a certain looking-glass, standing on the chimney-piece, and fastened by nails on each side to the wall, and a certain bookcase, standing upon brackets, and fastened by a screw at the top to the wall, were included under the term *fixed furniture* used in the will, even although they were not *ejusdem generis* with the grates, stoves, and other the articles mentioned in the prior enumeration, the judges of the King's Bench having been of opinion that the testator had intended to distinguish between fixtures on the one hand, and fixed furniture on the other, and also between furniture that was not fixed, and furniture that was, so that the fixation of the looking-glass, and of the bookcase, although of the very slightest character, was sufficient to take these articles out of the category of *furniture* simply, and to place them in the category of *fixed furniture;* and no question of fixtures, properly so called, was stated to arise in the case.

P. 42, between paragraph ending "arose," and paragraph beginning "Again," insert following paragraph :—

So also in the case of *Trappes* v. *Harter* (3 Tyrwh, 603), decided in 1833, where *X* was owner in fee of certain premises, and *X*, *Y*, and *Z* (who were co-partners in trade), put up certain machinery and utensils on the premises for the purposes of their trade (which was that of calico-printers), and where *X* and *Y* afterwards became seised in fee of the premises under a conveyance which made no express mention of the machinery or of the utensils, and mortgaged the said premises,

"and also the steam-engine, mill-gearing, &c., &c., and other matters and things standing, or being in or upon the said premises, which in any manner constituted fixtures and appendages to the freehold thereof," to A the plaintiff, for a term of years, and *X*, *Y*, and *Z* afterwards, while still remaining in possession, and carrying on their trade as usual, became bankrupt, and their assignees in bankruptcy sold, or claimed to sell, all or the greater part of the machinery and utensils in the possession of the bankrupts at the time of their bankruptcy, it was held, that the mortgage to *A* was intended to pass, and passed to A, only that part of the machinery which, from the circumstances of its erection, or otherwise, necessarily became part of the freehold, and that all that other part of the machinery (with the utensils), which was customarily removed in the trade, and which was also readily removable without injury to the freehold, was personal estate in the apparent ownership of the bankrupts at the time of their bankruptcy, and passed as such to the assignees, the defendants.

CORRIGENDA.

P. 16, line 16 from top, for "53," read "153."
P. 16, line 5 from bottom, for "fixtures," read "fixed."
P. 18, line 3 of paragraph 2nd, for "Ferrard," read "Ferard."

IT has been said of history that it finds its entablature in law; it may conversely be said of law that it finds its explanation in history. Hence arises the necessity for lawyers in interpreting the laws of any period to regard them in the light of the contemporary history; for so only are we able to intelligently judge of their consistency or inconsistency with the laws of the preceding and succeeding periods. The law of fixtures, the subject of this article, is more especially obnoxious to this necessity or rule, inasmuch as from its primary relation to the freehold of land, it has had to undergo, and has undergone, corresponding variations with each successive variation of its principal or relative. And just as those latter variations have been mainly occasioned by considerations of modern equity breaking in upon the rigour of the olden law, so also have the former variations been for the most part occasioned by like equitable reasons. The very name of "fixtures" affords in itself in the ambiguity, or rather the inversion, of its meaning, a perpetual memorial of the extent of the effects of this equitable interference; for while it doubtless originally connoted that sort of positive fixation and positive annexation which the etymology of it suggests, yet it now connotes the altogether negative and opposite conception of "the right to *unfix* or to *remove*" (*See Hallen* v. *Runder infra*). Moreover the infrequency in early times, and the frequency in these and in more recent days of disputes regarding fixtures, afford a further evidence or proof of the extent of these modern modifications of the law; as does also the scantiness,

or rather the almost total want of allusion to fixtures in the early records and memorials of our law.

This scantiness of allusion is, indeed, at first sight remarkable. Thus, the word *fixtures* does not so much as once occur either in the abridgment of Bacon or in that of Viner as a substantive head of law; nor is it mentioned among the "Termes de la Ley." It occurs, indeed, in Comyn's Digest, but in the addenda only, and not in the principal body of that work. In the Year Books it is as infrequent, nor do the smaller compendiums, digests, and abridgments of our early law present the name in any greater prominence or frequency. It is true, indeed, that the substance of the law of fixtures is found in all those early records, but then the materials of it there given are not only scanty in their amount, but are also stowed away among the subordinate divisions of other and seemingly unconnected heads of law. Thus, in the abridgment of Bacon, we find the following somewhat obscure allusion to them under the head of "Executors and Administrators":—

"(H) What shall be deemed the testator's personal estate or assets in the hands of the executor; and herein—(1.) . . . . (2.) . . . . (3.) What shall be deemed his personal estate; and therein what things shall go to the heir, and not to the executor."

And again we find numerous matters entered under the head of "Waste or Wast," which, we at first sight imagine, might as correctly have been entered under the head of "Fixtures;" and yet they nowhere appear under this latter head. The precise relation indeed of *fixtures* to *waste* in early and in more recent times is an interesting subject to investigate, and is a matter not altogether easy to define. It appears, however, speaking generally, that the law of waste, as being the earlier law, included within it in early times the law of fixtures, regarded at least from the landlord's point of view; and this aspect of the law of fixtures having been originally the only aspect of it, it would follow that

the law of fixtures and the law of waste were originally identical. But the law of fixtures in its predominant modern aspect is the law of the tenant more than of the landlord, and as such it is unknown to the early law, and is therefore specifically a different law from that of waste.

The comparatively late origin of the law of fixtures in the modern conception of it seems, however, to admit of explanation. If we call to mind the peculiarity of the relation subsisting in old times between the lessor and his lessee—a relation in which *status* was everything, and in which *contract* had neither place nor part; where the tenant had no civil existence independently of, or as against his lord, but was (so far as regarded his tenancy at least) the mere bailiff or agent of his lord; we shall readily understand, I think, that in such a relation the maxim of *accessio cedit principali* found unobstructed operation. From this maxim, which in its special application to land assumed in the civil law the form of "*Solo cedit, quod solo inaedificatur,*" and in our own law the form of "*Quidquid plantatur solo, solo cedit,*" it followed in virtue of the relation aforesaid subsisting between landlord and tenant, that everything of whatever sort put up upon or put into the soil by the tenant straightway became part and parcel of the soil, and the tenant had no right, even during his term, to remove or to unfix it again. It was, in fact, the landlord's fixture from the first, and the tenant had neither any property in it, nor any right to, or power over, it in this the earliest phasis of the agricultural relation. So long, therefore, as this phasis of that relation continued, there was neither occasion nor opportunity for the question of fixtures to spring up as between landlord and tenant. It was only and could only be from the time that the tenant acquired a certain personal freedom or individual independence that the question in this aspect of it could arise; for fixtures as we have seen is a word which peculiarly regards the tenant as waste does the lord. And although it is true that a man who was the villein of one lord might be the tenant of some other person to whom he stood in

no relation of villenage, still as he occupied a position which was customarily assigned to the villein, although his personal rights were unabated, his rights in respect of his tenancy doubtless suffered depression from the analogy of the villein's condition; and beyond all doubt those latter rights were most difficult if they were not impossible to assert, for where was the law which recognised them, or the legal machinery which enforced and supported them?

Now it is matter of history that this primitive relation subsisted in all its unmitigated rudeness for a period that was sufficient to allow the full development and solidification of the law of agricultural fixtures purely and simply so called, that is to say, of erections and other things which were indispensable to the bare or necessary enjoyment or culture of the land as such. The primitive rigour of this branch of the law of fixtures admits therefore of the simplest explanation; and the continuance of that rigour down to the present times admits of as ready a one. Its continuance is in fact a result of the operation of that maxim of our law which is expressed by the phrase "*Æquitas sequitur legem*," whereby equity is rendered powerless to check the operation or to remedy the effects of a law which has been once definitely and clearly formed, and declared. But indeed the villein or anti-villanus had little (if he had any) equitable ground of complaint: "*Nam scienti alienum esse solum, potest culpa objici, quod temerè aedificaverit in eo solo, quod intelligeret alienum esse*" (Inst. II., 1., 30).

It appears to have been in the reign of Edward I. that the villein or pro-villein class first rose to importance, and accordingly we find, in the reign of Edward II., his immediate successor, the first trace of a contention between a landlord and his tenant, respecting the claim of the latter to take down certain agricultural erections put up by himself upon his farm. Thus we read in the Year Book (I., 518), that in the 17 Edward II., a person who was the lessee of land built a house upon the land, and afterwards pulled it down, and was adjudged guilty of waste for so doing. Lord Coke, in appa-

rent reference to this case, remarks (Co. Litt., 53*a*), that there was waste in the building of the house, and also new or further waste in afterwards suffering it to waste. This decision, which is the first of the reported decisions upon the matter, probably checked for a time the enterprise of the villein improver; but that enterprise soon discovered other contrivances whereby to elude or to defeat the landlord's right. These contrivances we shall consider hereafter, for the present we must follow up the effect of the decision itself. It appears, then, that the decision was thoroughly effective, and even final, upon the particular state of matters in respect of which it was pronounced, for although we do indeed find a considerable number of cases, both early and recent (being the cases hereinafter in that relation mentioned), upon matters more or less resembling this particular state of matters, yet we do not find any other instance of a dispute regarding the identical state of matters, until so recent a date as the beginning of the present century, when the same question was again raised, and apparently in a wilful or intentional manner, in the great case of *Elwes* v. *Mawe* (3 East, 38), decided by Lord Ellenborough in 1803. The inducement for bringing this case forward at all at the time appears, as well from the arguments of counsel as from the judgment delivered in it, to have been the hope of being able, upon the strength of the (as we shall see) admitted liberality of the law of fixtures in matters other than the strictly agricultural, to extend the like liberality to the strictly agricultural fixtures also, and thereby to dissipate and to dispel by one decision, conceived in the modern spirit, the rigour of a law which had descended without mitigation from the olden times. But the endeavour failed of its object, and the old rigour of the law of agricultural fixtures—where those fixtures were buildings let into the ground—survived then, as it still survives, the noble and learned judge having decided, after an examination of all the cases, that "no adjudged case had yet gone the length of establishing that buildings subservient

to the purposes of agriculture, as distinguished from those of trade, were removable by the tenant himself who built them during his term."

The cases to which we alluded on a previous page as having arisen upon matters more or less resembling the state of matters exemplified in the 17 Edward II., and in *Elwes* v. *Mawe*, are chiefly the following:—In the 24 Eliz. in *Cooke's case* (Moore, 177), one *Cooke* brought an action of waste against one Humphrey, and for waste assigned (*inter alia*) the distraint of two doors with their cheek posts. Humphrey pleaded the erection of the said doors and posts by himself after the commencement of his tenancy, and their removal at the expiration of it, and upon demurrer the justices held that Humphrey's defence was no plea, Mr. Justice Pirryam stating as follows: "When the lessee takes glass windows or doors which were already in the house at the time of the granting of the lease, such taking is waste; moreover, if the lessee annexes anything to the frank tenement and afterwards takes it, such taking also is waste. Now some doors are a defence to the frank tenement as outer doors, while others *are less in the nature of necessities*, for example, the inner doors which separate the apartments within the house. It seems, therefore, that a lessee who erects the posts for outer doors, and slings the doors upon them, cannot afterwards remove the doors during his term; but it is otherwise with inner doors." Again, in the 41 Eliz., in the case of *Warner* v. *Fleetwood*, quoted by Lord Coke at the conclusion of his report of *Herlakenden's case* (4 Rep., 64*a*), it was resolved *per totam curiam* that glass annexed to windows by nails, or in other manner, by the lessor or by the lessee, could not be removed by the lessee, for without glass it was *no perfect house;* and by lease or grant of the house it should pass as parcel thereof, and that the heir should have it, and not the executors; and it was likewise then resolved that wainscot, were it annexed to the house by the lessor or by the lessee, was parcel of the house; and that there was no difference in

law "if it be fastened by great nails or by little nails, or by screws, or by irons put through the post or walls (as have been invented of late time), but if the wainscot is by any of the said ways, or by any other way, fastened to the posts or walls of the house, the lessee cannot remove it, but he is punishable in an action of waste, for it is parcel of the house; and so by the lease or grant of the house (in the same manner as the ceiling or plaistering of the house), it shall pass as parcel of it."

There is also a case of *Darcey* v. *Askwith* (15 Jac. I.), reported by Hobart (234), which is more important for the dicta which it contains than for the decision which was given in it. The principal of those dicta may be said to be the following:—

"It is generally true that the lessee hath no power to alter the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture. . . . A lessee may build a house where none was before, but that must be every way at his own charge. . . . And if he keep it not in repair, an action of waste lies."

Such having been the rigour of the early law, and that rigour having survived, as we have seen, to the present day in respect of all those strictly agricultural erections, and the necessary completions thereof, which would have fallen in old times, and which do, therefore, now also fall within the scope of the old law, the tenant's only safety, in putting up strictly agricultural buildings that are to be actually let into the soil, or any of the necessary completions thereof, is one or other of the two following courses; namely, either (1.) To enter into such stipulations, or into such an agreement, with his landlord at the commencement of his tenancy regarding the cost of the erections, or regarding the subsequent continuance of his tenancy or otherwise, as his own practical wisdom may suggest; and failing such stipulations or such an agreement, then, (2.) To obtain from the landlord some

indication or expression of his consent to the buildings being erected. In the one case he will secure to himself a remedy upon the special stipulations or agreement; in the other case he will be able to proceed under the Statute of 14 & 15 Vict. c. 25, which, in its third section, enacts as follows:—

"That if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in, or permanently fixed to, the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed; provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord, who shall have so elected to purchase the same."

But besides buildings fixed into the soil, it is evident that other buildings might be erected which should either rest upon without being fixed into the soil, or which should not even rest upon the soil but upon some substructure in the

soil expressly prepared to receive them; and it was in resorting to this latter species of erections that the villein enterprise or sagacity, to which we have alluded, principally displayed itself. The case of *Culling* v. *Tuffnall* (Bul. N. P., 34) is a good illustration of this latter class of agricultural buildings. It was the case of a *barn* raised upon "patens and blocks of timber lying upon the ground, but not fixed in or to the ground." Treby (L. C. J.), who tried the case at Hereford in 1694, declared the barn to be removable by the tenant who had erected it. The ground of his lordship's opinion is stated in the report to have been *a custom* in that part of the country of erecting barns in the manner described, with a view to carrying them away again at the end of the term. Mr. Justice Buller however remarks of this case, that although the Lord Chief Justice thought proper to rest it upon the custom of the country, he (Mr. Justice Buller) apprehended that it would now be determined in favour of the tenant without any difficulty; "for of late years," he says, "many things are allowed to be removable by tenants which would not have been permitted formerly." And Lord Ellenborough remarks of this case in the leading case of *Elwes* v. *Mawe* before cited—"To be sure the tenant might (take them away at the end of his term), and that without any custom; for the terms of the statement exclude them from being considered fixtures: 'They were not fixed in or to the ground.'" It appears to us, if we may hazard an opinion in the case, that Mr. Justice Buller's explanation is preferable to that of Lord Ellenborough; for we think that the latter explanation would not alone have been sufficient to account for the original removability. For it has appeared in the previous part of this article, that the law of agricultural erections, being those erections which were (as indeed all the original agricultural erections were) *barely necessary* to the enjoyment of the land, or to the performance of the ordinary farm routine, was of a grasp sufficiently rigorous and comprehensive to embrace in the earliest times

even such agricultural erections as the barn in question, which were either not fixed in the ground at all or were but slightly fixed in it. And it wanted therefore the growth and counteracting influence of a contrary custom to relax the illiberality of the rule; it is however true that, by the year 1803, and indeed long before it, that silent pertinacity, which is the soul of liberty, had established a universal custom of removing fixtures even although strictly agricultural which were constructed in the manner of the barn; and the fault of Lord Ellenborough's criticism upon the case is not that it is erroneous in the substance, but that it is unlearned in the reason, of it. There does not appear, with the one remarkable exception of *Wansboro'* v. *Maton*, hereinafter set forth, to have been any other decision upon a state of matters which was in all respects like to the state of matters presented in the *Barn case* of *Culling* v. *Tuffnall;* and it may be assumed therefore that that case also settled the law in this particular respect upon its definitive and final basis.

We shall find, indeed, in the second or following division of our subject numerous resembling cases of like erections, which were held to be removable by the tenant who had erected them; but we shall there also find that the ground upon which this removability was declared was something entirely unconnected with agriculture. And we may therefore regard this first division of our subject, the purely agricultural part of it, as completed.

Before leaving it, however, it is desirable to extract from it the principle which it is so well calculated to give, and which must be our guiding principle throughout all the rest of this investigation. We have seen how it was that by the most natural of all processes the early agricultural erections instantly and invariably became part and parcel of the soil upon which or in which they were set up. This ready union of the fixtures with the soil may be resembled to the union or commixture of two objects which have a

chemical affinity for each other; it was something altogether different at least from that merely mechanical union which is created or produced by the juxtaposition of two non-resembling bodies. Now it is extremely important to attend to the nature of this quasi-chemical union between the soil and the fixtures. For if it be possible to find a like quasi-chemical affinity to exist between any other *res principalis* and its particular fixture or appendage, then it would only be consistent in such a case to hold that there also a quasi-chemical union either has arisen or ought to arise between the two objects, in the absence at least of any countervailing equitable considerations. It becomes therefore in all cases a preliminary, and indeed indispensable, step in determining whether and by whom a particular fixture is removable, to first ascertain the proper or distinctive character of the *res principalis* itself. Thus the inheritance in general consists of land purely and simply so called, and the fixtures which would in such a case present an inherent affinity to it would be those only which are strictly agricultural. Sometimes, however, and more frequently perhaps than not in these modern days, the inheritance consists of land *plus* some particular character of as permanent a nature as the land itself.

Now, in this latter case, the particular fixtures which would have an affinity for the inheritance would be those objects or things which were themselves also in some essential manner possessed of that character, in other words, which were peculiarly or directly subservient to the enjoyment of the land in that its seemingly adventitious yet permanently acquired and natural character. The principle for which we are at present contending finds its illustration and expression in the *Salt Pans case* of *Lawton* v. *Salmon* (1 H. Bl., 259 *n*). In that case the inheritance consisted of *Salt-works*, and the fixtures which were the subject of dispute were the *salt pans* used in the works, two things between which there was an evident correspondence and affinity, or similarity of mutual adaptation.

The case presented no circumstances of peculiarity giving rise to any equity as between the parties, so that the simple and unbiassed question to determine was this, whether the *quality of the inheritance* should or should not determine the quality of the fixtures also, that is to say, should determine whether these fixtures were irremovable, as forming part and parcel of the inheritance; for it was admitted that the salt-pans were, as a matter of fact, removable, and that too without damage either to themselves in the removal or to the building in which they were placed. Lord Mansfield, the judge who determined the case, recognised the importance of our principle of regarding the quality of the inheritance as the primary consideration in determining the quality of the fixtures, and after briefly stating the then law of fixtures in the ordinary applications of it, said as follows:—

"The present case is very strong. The salt-spring is a valuable inheritance, but no profit arises from it unless there is a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials. On the reason of the thing therefore, and the intention of the testator, they must go to the heir."

The reader will, doubtless, have observed from the quotation given above, that Lord Mansfield regarded the spring or the ground out of which it issued as being in itself the inheritance, and that he included the salt pans and the salt-works in the same catalogue of accessories to the principal thing or the inheritance; it might, however, be submitted, that at the time of the erection of the salt pans the salt-works were already part of the inheritance (see Report of case), and that the pans therefore went with the works

plus the spring, and not that the works *plus* the pans went with the spring; although indeed if Lord Mansfield's view is to hold even in this particular matter—a matter upon which his lordship would probably not have insisted, then our view of the case is strengthened all the more, as the salt pans would in such case be in a double degree the accessory of the *res principalis*.

This principle of ours was also afterwards recognised and proceeded upon by Lord Brougham in his elaborate judgment in the case of *Fisher* v. *Dixon* (12 Cl. & Fin., 312), where, after expressing his disapproval of the *Cider Mill case* (cited in *Lawton* v. *Lawton*, 3 Atk., 13), or rather the want of sufficient data to judge of the correctness of the decision which was given in it, he continued, with some slight inaccuracies, as follows:—

"If a cider mill be fixed to the soil, though it is a manufactory and erected for the purpose of a manufactory, yet if it is really *solo infixum*, it is perfectly immaterial whether it be for the purpose of a manufactory, or of a granary, or of a barn, or of anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say, that one of the great brew-houses would belong to the executor, because it is erected for the purpose of a manufacture which is wholly unconnected with the land? . . . It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brew-houses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley, of which to make malt. But although it is a manufactory, . . . it would go unquestionably to the heir."

The principle was also followed in *D'Eyncourt* v. *Gregory* (3 L. R. Eq., 382), decided in 1866 by Lord Romilly (M.R.) In this case, which was a case of the replacement of the old mansion upon certain settled estates by a new mansion, both larger in dimensions and more costly and magnificent in its fittings up, his lordship, after making certain pre-

liminary statements and remarks, spoke of the internal fittings up of the new mansion as follows:—

"Both the painting and the tapestries could unquestionably be removed in this sense, that they could be taken down, and the place be either left open or be filled with satin; so likewise the satin in the frames could be taken down, and the gaps replaced by paper; and doubtless the paper, being stuck close to the wall, could not be removed. But, in my opinion, in all these cases, whether it be paper, or satin (or panels), or tapestry, they are all part of the wall itself, and they are fixtures not to be removed. In all these cases, the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding-stone * of a flour-mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir. . . . With respect to the carved kneeling figures on the staircase in the great hall, and the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design for the hall and staircase itself. . . . They resemble the stone of a mill, which is part of the mill itself, and goes to the heir-at-law."

Our principle would probably explain even the case of the *Cider mill* itself (quoted *supra*), upon which so many criticisms have been passed, and explain it moreover independently of the custom upon which Lord Hardwicke in Atkyns inclined to rest it; it would explain it, for instance, if we might assume that the inheritance which was the *res principalis* in the case was not purely and simply, or permanently, a cider manufactory, but was land primarily and mainly, and in fact almost exclusively, adapted for and devoted to agricultural purposes; and that the mill itself had an entire or individual existence after its removal. At all events our

* *See Wystow's case* cited in *Place* v. *Fagg*, 4 Man. & Ry., 777.

principle had been recognised at the date of the cider mill and for a long time before it. Thus we occasionally find it expressed in the cases given in the Year Books, and we more frequently detect it underlying those cases: and indeed it explains certain points in them which, but for the explanation it affords, would be contrarient to the more modern views. For example, in the 20 Hen. VII. (7 Year Book, 13, 24), in an action of trespass brought by an heir against the executor of his ancestor for the alleged tortious removal by the latter of a furnace which had been fastened with mortar to the frank tenement, we find that the Court of Common Pleas declared the removal to have been tortious for the reasons which follow, namely:—

"Those things which can neither be forfeited on outlawry in a personal action, nor be taken in execution, nor be distrained for rent, such things the executors shall not have; but a furnace, or a table fixed with posts in the floor, or a wainscot, or border fastened to the frank tenement, also doors, windows, and other such things as are annexed to the frank tenement, and made '*pur un profit del inheritance*,' can neither be forfeited on outlawry, nor be taken in distress. . . . . But if they are removable, then are they not part or parcel of the frank tenement."

And again in the 21 Hen. VII., in a like action between like parties, and for a like alleged tortious removal, we find the judges giving the following opinions, namely—

Mr. J. Pollard was of opinion that the action would lie, for (as he remarked)—

"Such things as are fixed or fastened to the frank tenement will descend to the heir along with the inheritance, and moreover they will pass by feoffment with the frank tenement, *e.g.*, where vats are fixed in the ground, whether in a brew-house or in a dye-house, they are appurtenances to the frank tenement, and are altered from the condition of chattels."

Mr. J. Kingsmill remarked—

"After it is fixed to the frank tenement, it is incident to, if it is

not also parcel of, the frank tenement; and it will in all cases go with the frank tenement. . . . . And when a person fixes vats in brew-houses or in dye-houses, and then deceases, his heir shall have the vats; for immediately upon their fixation they are for the continual profit of the house, and it is therefore more reasonable that the heir should have them (he having also the frank tenement to which they are fixed), than that the executors should have them (they having nothing whatever to do with the frank tenement)."

It is the same principle which also explains that frequently quoted passage in the Touchstone (pp. 469, 470), where it is said that an executor "shall not have the *incidents of a house*, as glass, doors, wainscot, and the like, no more than the house itself." Nor is the principle affected, or, if affected at all, it is only affected to be confirmed by the passage in the Office of Executors (p. 53), which says that if the testator has only a term of years in the premises, and die before the term is expired, then his executor will succeed to his interest in the land, and also and in virtue thereof to his interest in the fixtures (deer, &c.) which belong to the land. And the principle is indeed generally recognised as having its foundation in reason and in good common sense.

This principle being established and the first branch of our subject having been completed, we proceed to the second branch or division of it, which is—the tenant's right to unfix or to remove fixtures other than strictly agricultural ones, which either rest upon the ground, or other *res principalis*, without being fixed in it, or which, if fixed in the ground, or other the *res principalis*, are so fixed in it as not to be finally or indefeasibly incorporated with or annexed to it in contemplation of law, and which therefore retain their individual entirety, both while they are fixtures and afterwards when they are severed. It is evident that this branch or division of our subject is much more complex in the matters which are the subject of it than is our first division; and we might therefore *prima facie* expect that the rule

which is to express the law of fixtures in this case would be correspondingly more various or complex. And yet that law is not incapable either of brief exposition or of simple and clear expression.

First it appears that this second division is apparently threefold, as embracing three apparently separate or distinct heads or classes of fixtures, namely, (1.) Mixed Agricultural; (2.) Trade Proper; and (3.) Domestic or Ornamental.

With reference first to the Mixed Agricultural Fixtures of this division, they are to be distinguished of course from the purely agricultural ones, such as the *barn* in *Culling* v. *Tuffnall*, which has already been stated and criticised, and such as the *buildings let into the ground* and the *necessary completions to buildings*, exemplified by the other cases that were mentioned in our first division. They seem, however, to be not altogether different from those cases of furnaces, engines, &c., which have been quoted from the Year Books; for this latter class of fixtures were the effects as they are also the indications of the rise of modern wealth, being not indispensable to the bare or necessary cultivation of the ground or other the business of a farm, but being rather conveniences or utilities superadded to the early original list of necessities; and having had their origin under a milder law, they were protected from the operation of the older law by the equitable considerations which more modern manners supplied. Foremost among those equitable reasons was the favour shown to *trade*; and just as this one equity is the alone foundation of the law of the so-called Trade Fixtures, the second of the sub-divisions of this branch of our subject, so has it contributed the principal part of the foundation to the law of the so-called Mixed Agricultural Fixtures the first of these sub-divisions, for it has by counteracting defeated the operations of the older and stricter law of purely Agricultural Fixtures, and it has in fact assimilated in all or nearly all respects the law of the so-called Mixed Agricultural to the law of the so-called Trade Fixtures

Proper. Moreover, the operation, not indeed of the *same* but of a *like* equity, and of an equity moreover which was equally the effect and the indication of modern wealth, has assimilated in like manner the law of the so-called Domestic or Ornamental Fixtures to the united law of the so-called Mixed Agricultural and Trade Proper Fixtures, so that in fact the customary distinction of the fixtures of our second division into the three classes of Mixed Agricultural, Trade Proper, and Domestic or Ornamental is groundless or futile in itself, however much it may hitherto have been thought to be subservient either to clearness of exposition or to accuracy of conception. We shall therefore not retain this distinction of phrases, but shall endeavour to effect a unification of the law in the three aspects of it which they apparently denote.

Nor do we think that our attempt is either idle or unprecedented. It is not unprecedented, for Mr. Amos and Mr. Ferrard, in their well-reasoned but in some respects imperfect treatise on this subject, contend in one place, and contend truly although inaccurately, that in the passage next hereinafter quoted from the Year Books, the relaxation of the law in early times in favour of the tenant was not confined, as has been generally supposed, to trade erections alone, but extended to agricultural erections also. Nor is our endeavour idle, as we hope to prove by the success of it.

The passage from the Year Book to which we last referred is a further part or continuation of the passage already quoted under the year 20 Hen. VII., and is to the following effect:—

"If a lessee for years make a furnace '*pur son avantage*' (or '*pur son plaisir*'), or being a dyer, make vats and vessels '*pur occupier son occupation*' for the time during which his tenancy is to last, then he may remove them; but if he permit them to remain fixed in the earth after the expiration of his term, then they become the property of his lessor; and so of a baker. Nor is it waste (in

the opinion of some, although not also of others) to remove articles of this sort during the term."

Now with reference to this passage we should contend for a more thorough and complete extension in early times of the relaxation which was then made in the rigour of the old law of fixtures, and we would suggest that the relaxation (always excepting those strictly Agricultural Fixtures which belong exclusively to the old law) was general, and extended not merely to Trade Proper fixtures, but also and equally to the Mixed or Modern Agricultural, and to the Domestic or Ornamental classes of fixtures; and our contention and suggestion in this respect seem to be entirely borne out and supported by the later decisions to which we now proceed.

In proceeding with, or in resuming our inquiry into and investigation of, the cases upon this branch of our subject, we find that the principle which we were at pains to elaborate on a previous page here or now begins to be positively serviceable to us, reminding us (as it does) to first ascertain the quality of the inheritance or *res principalis* before attempting to adjudicate upon the fixtures or appendages to it. And again, that early agricultural relation, which we were also at pains to explain on a previous page, renders us here also or now a negative service which is almost as valuable as the positive one, reminding us (as it does), in its turn, that the rigour of the old law of that relation does not extend to the matters which are exclusively the subject of the new law. It follows, therefore, at once that in this second division of our subject, and in respect of all those fixtures which are the subject of the new law, equitable considerations having risen paramount over legal ones, the tenant is now as highly favoured as he was formerly depressed, and a long string of consentient decisions illustrates, as it corroborates, this indulgence. Thus, in the year 1704, it was held in *Poole's case* (Salk., 367) that certain *vats* put up by the tenant, who

was a soap-boiler, were removable by him, and had therefore been lawfully taken by the sheriff under a *fi. fa.* upon an execution issued against him. Again, in the year 1799, it was held in the case of *Dean* v. *Allalley* (3 Esp., 11), that certain erections called Dutch barns, being sheds with a "foundation of brick in the ground, and uprights fixed in, and rising from the brick work and supporting the roof, which was composed of tiles, the sides being open," were not included within the scope of a covenant by a tenant whereby he had bound himself to leave all the buildings which were at the date of the lease already erected, or which should or might during the continuance of the lease be erected upon the land demised to him, Lord Kenyon (the judge who tried the case) being of opinion, that erections like the barn in question which were put up for the benefit of trade or manufacture, for the more advantageous carrying on thereof, were not included under the word "*buildings*" or "*erections*" expressed in the covenant, which he said were only such buildings and erections as were "annexed to . . . the reversionary estate,"—a subtlety of distinction the justice or correctness of which, although it is not at first sight apparent, becomes apparent enough when, on the one hand, that paramouncy of equitable over legal considerations, to which we have referred as characterising the relation of landlord and tenant under the new law, is taken into account, and when, on the other hand, it is also considered that the erections in question, although Agricultural, were of that Mixed or Modern Agricultural sort which we stated to be rather useful and convenient in the profitable management, than necessary to the bare or simple management of the farm, and that as being so they fell in fact under the mildness of the new, and were exempted from the rigours of the olden, law.

Again in 1801, in the case of *Penton* v. *Robart* (2 East, 88) it was held that a certain *Varnish-house,* put up by a tenant

who was a maker of varnish upon the land demised, and being an erection which had a brick-foundation let into the ground with a chimney belonging to it, and which in its upper part or super-structure consisted of wood brought by the tenant from his former place of business, was removable by the tenant at the end of his term, and under the particular circumstances even after the end and full expiration thereof, Lord Kenyon (the judge who tried the case) resting his decision in this case also (as he had done in *Dean* v. *Allalley*, *supra*) upon the "costly" or supererogatory and unnecessary character of the fixtures, as distinguished from those which are barely necessary for the cultivation of the land as such —a distinction which may indeed be fathered upon Lord Kenyon, whose customary legal acumen perceived in it a means of observing the law at the same time that he escaped in the matter of modern fixtures from the early rigours of it.

Again, in the year 1830, in the case of *Grymes* v. *Boweren* (6 Bing., 437) it was held that a *pump* was removable by the tenant who had erected it; and although the decisions of the Lord Chief Justice (Tindall), and of the other judges who decided the case, proceeded to all appearance exclusively upon considerations suggested by the mode or measure of the annexation, yet we must assume that there was also in their minds an underlying conviction or perception that the fixture in question was not (as in fact it was not) one of the old agricultural class of fixtures, but was rather one of those convenient or useful erections peculiar to modern times. It may be, however, that in this case, and it appears beyond all question that in the cases which were decided subsequently thereto, the conviction or perception to which we have alluded dropped altogether out of view in respect of those so-called fixtures, which were removable in their entirety without damage to the freehold, and fixtures of the last-mentioned class came in consequence, by an abusive extension of the modern principle, to be regarded even when put up for the

purposes of agriculture as being of an essentially *chattel* nature. Thus we find that in the case of *Wansboro'* v. *Maton* (4 A. & E., 884), decided in the year 1836, it was held in apparent confirmation of, yet in real contrariety to, the like case of *Culling* v. *Tuffnal* before set forth, that a barn (called a stavel-barn) consisting of "wood resting on, but not fastened by mortar or otherwise to certain caps or blocks of stone (called stavels or staddels) fixed into the ground or let into brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even ground for the barn to rest upon," was removable by the tenant who had erected it; for, in the words of Lord Chief Justice Denman (one of the judges who decided the case), "the first question to determine was, whether the erection was a part of the freehold; for if it was not united to the freehold, then it was no part of it; and as in fact it was not so united, it was therefore not a fixture," and Mr. Justice Little (another of the judges who decided the case) remarked, "In removing the barn, he does not disturb the freehold; . . he might take away this building, and substitute, for instance, a fowl-house for it, keeping always the same foundation. . . . This barn is kept in its place merely by weight."

It is most important to remark this change in the point of view from which the question of fixtures is regarded in the more modern decisions, for the effect of it was and is clearly to subdivide the class of the Mixed or Modern Agricultural Fixtures into two minor classes, namely—(1.) The class of fixtures which, although of the modern type, and therefore (as being subject exclusively to the modern law) removable by the tenant, are yet visibly and corporeally, or in some other particular manner, fixed to the land or premises, and so long as they are so fixed are for all the purposes of the modern law part and parcel of the freehold; and (2.) The class of fixtures which being, whether *rightly* or *abusively*, of the modern type, and therefore subject ex-

clusively to the modern law, are yet neither visibly nor corporeally, nor in any particular manner, fixed into the land or premises, but are always and at all times *chattels* only. The importance of this subdivision appears more especially in its application to the law of *distress.* It is well known, and indeed it has repeatedly appeared in the quotations which have been made upon previous pages of this article, and more especially in those of them which are taken from the Year Books, that in early times the fixtures put up by a tenant were not distrainable by his landlord for rent; and the reason of their exemption from this process is too apparent for us to mention here. But when the old law came to be relaxed in the manner we have pointed out, then it was not so clear how that relaxation was to operate upon the law of distress; while the tenant acquired the advantage of *removal,* was he also to retain as before his right of exemption from *distress?* Or if he was to retain this latter right, was he to retain it *in toto,* that is to say, to its fullest extent, or was he to retain it as to part, and to remit it as to all the rest?

Now the law upon this matter, and in this respect, ending as it did in a compromise, wanted several decisions to settle it. For our purposes, however, the two decisions of *Darby* v. *Harris* (1 Q.B., 895), decided in the year 1841, and *Hellawell* v. *Eastwood* (6 Exch., 295), decided in the year 1851, sufficiently settle and express the law in its twofold modern distinction between fixtures that are distrainable and fixtures that are not so. In the case of *Darby* v. *Harris,* the fixtures regarding which the dispute arose, were "a kitchen range, a register stove, a copper, and also grates," annexed to the freehold in the ordinary manner and admitted to be "fixtures removable by the tenant." The contention on the part of the plaintiff, the tenant, was this—that this class of fixtures were not distrainable for rent; the endeavour of the defendant, the landlord, on the contrary, was this—to show that the alleged fixtures were in reality not fixtures, or at least not so much fixtures

as they were chattels or personal estate, in which latter case he contended that they were lawfully distrainable for rent. The Court of Queen's Bench decided that the articles, the fixtures in dispute, were of the class that was not distrainable for rent, and for this reason (as appears from the several judgments which were delivered), that they were things which, from the nature of them, could not, after payment of the arrears of rent, be restored again to the tenant in their original plight and condition.

On the other hand, in the case of *Hellawell* v. *Eastwood*, the fixtures around which the contention centred were "cotton-spinning machines, fixed by means of screws, some into the wooden floor, some into lead, which had been poured in a melted state into holes in stones, for the purpose of receiving the screws," and the contention on the part of the plaintiff, the tenant, was, as in *Darby* v. *Harris*, that articles of the sort in question were parcel of the freehold, and, moreover, that they could not, if removed, be restored again in their original plight and condition, but Baron Parke (the judge who decided the case) was of opinion and held that they were in no sense part or parcel of the freehold, and on that count, therefore, were not exempted from distress; moreover that they were capable, after being removed, of being restored again in the like plight and condition, and, therefore, neither on that count were they exempted from distress; they were, therefore, lawfully distrainable. The learned Baron, after disposing of certain preliminary matters, proceeded in his judgment as follows:—

"The only question, therefore, is whether the machines when fixed were parcel of the freehold, and this is a question of fact. . . . Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; . . . they were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose

of keeping it stretched out. . . . They never ceased to have the character of movable chattels, and were therefore liable to the defendant's distress."

The reader, we trust, will not suspect us of having garbled this judgment for the purpose of serving our own particular views, for indeed the omitted passages are altogether irrelevant to the point which was in dispute, and having therefore no application to the particular matter, they are expressed with an unfortunate vagueness of generality which has caused them to be frequently misunderstood, as was indeed observed by Vice-Chancellor Wood in the important case of *Mather* v. *Fraser* (2 K. and J., 536) hereinafter set forth. But see *Addenda*, p. xi.

From the two cases which have been now latterly stated, it clearly appears that at the date of those cases the law of fixtures considered in the abstract had become as definitely and fully stated and known as it is at present, and accordingly the point in dispute thenceforth has been, and now is (as it then partly was) some fact or thing external to the law itself, being some peculiarity of circumstance—either (1.) In the method and measure of the alleged annexation to the freehold; or (2.) In the construction of some written document, which by the act of the contending parties themselves or otherwise has been made to govern or regulate their rights; or (3.) In the effect which is to be given to certain *derivative* rights, the consequences of certain *derivative* relations which have come (in whatever way) to be vested in and established between the contending parties.

In considering the subsequent decisions, it is, however, still most essential and necessary, not merely with a view to the consistency of our scheme, but also by way of a preservative against incorrectness in practical opinion and decision, to bear in mind the precise relation in which the modern law stands towards the ancient one in this matter of fixtures, and in particular, first of all to settle with ourselves whether the particular alleged fixture is of such a

nature as to fall within the rigours of the old law; secondly to ascertain what is the quality of the inheritance in each particular case, and whether, therefore, the particular alleged fixture has or has not such a correspondence with or affinity for the inheritance as to have become not only actually but indissolubly united with it; and then thirdly, or lastly, and always in subordination to the matters firstly and secondly mentioned, to consider the weight which is to be attached to any one or more, or to all of those three external matters to which we have just referred, that is to say, the mode of the outward and visible annexation, the contents of some particular document, or the derivative positions of the contending parties. For it is only by keeping in mind all these numerous matters, and by observing their respective due priorities of importance, that we can either estimate new cases as they arise, or test the consistency of the existing cases either with each other, or (and more especially) with the earlier decisions.

By way of illustrating the application of this somewhat complex rule of decision, we may refer to the following cases (being all of them cases which have been already mentioned *supra* in a different respect or for a different purpose). (1.) To the case of *Elwes* v. *Mawe*, as an instance of the application of our rule having stopped short at the first part of it, the fixtures in that case having in fact been caught and stopped in the first sieve, by having been determined to be of the old or strictly agricultural kind. (2.) To the case of *Lawton* v. *Salmon*, and to the case of *D'Eyncourt* v. *Gregory*, as two instances of the application of our rule having proceeded as far as to the second part of it, the fixtures in these latter two cases having safely passed through the first sieve, but having been caught and detained in the second one, by having been determined to be fixtures of the modern class (whether Trade Proper or Ornamental), but to have at the same time presented that species of affinity for the *res principalis*, or inheritance which caused them to become straight-

way united in a chemical and indissoluble union with it. (3.) To the case of *Hellawell* v. *Eastwood*, as an instance of the application of our rule having been carried to its furthest stage, the fixtures in that case having passed through both the first and the second sieves, and having had their character determined for them by the first one of those subsidiary external considerations before enumerated, to wit, by the mode of their annexation to the freehold; and we may here mention that the rule in this last mentioned extent of its application will find constant illustration (alone or in combination with other ingredients) in the cases which are yet to be set forth in the sequel of our article.

There remain to be illustrated two further applications of our rule, namely — (1.) That application of it which is finally determined by some regulative document in the nature of an agreement; and (2.) That application of it which finally turns upon some derivative relation or relations which have come to be established in one or both of the contending parties towards some third person or persons. But inasmuch as the illustration of these latter applications of the rule forms in reality the substantive continuation of the Law of Fixtures, which is the subject of our article, in proceeding with that illustration, we in fact resume the consideration of our subject in its main or leading branch.

Now it might *primâ facie* be supposed that in accordance with that well-established principle of our law, whereby "modus et conventio vincunt legem," a written document in the nature of an agreement between the persons, the parties to it, would in all cases be the *paramount* consideration for counsel and judges to regard in forming their opinions in respect of the fixtures comprised or apparently comprised in it, or affected or apparently affected by it; and it has been customary for writers upon this branch of our law (with the notable exception, however, of Mr. Amos and Mr. Ferard) to make the existence or non-existence of such an agreement the principal criterion for the logical division of their subject. We may point out, for example, that in the two latest works

upon the law of landlord and tenant, the work of Mr. Fawcett, and the joint work of Mr. Smith and Mr. Soden, this is the treatment which has been adopted. And yet if our historical deduction, as given on the preceding pages, is correct, and more particularly, if Lord Kenyon was justified (as we think he was), in taking the somewhat nice distinction, which he did take, in the case of *Dean* v. *Allalley*, *supra*—a distinction which is not (as sometimes supposed) at variance with the decision in *West* v. *Blakeway*, *infra*, or with the decision in *Bidder* v. *Trinidad Petroleum Company*, *infra*—then we, for our own parts, at least, should hesitate to accept with the same unguarded and unsuspecting readiness that certain others do, the fact of agreement or no-agreement as the paramount criterion in all cases whatsoever; although perhaps in the great majority of modern cases, and of cases presently arising, the factum or non-factum of an agreement is practically the primary, and, in many cases, the only consideration. We persist, however, in our opinion, as formerly expressed, that the true historical (and therefore also the only truly logical) importance of this criterion is that which we have assigned to it above, namely, an importance subordinate and secondary to the application of the two rules which respectively regard (1.) The amenability or non-amenability of the particular fixture to the old and rigorous law affecting the strictly agricultural class of fixtures; and (2.) The correspondence or non-correspondence of the particular fixture to the quality of the inheritance, whereby it becomes, or does not become, chemically united with it, and in a manner absorbed into and lost in it. With this explanation (which may possibly be liable to refutation) we proceed to set forth the cases into which an agreement has entered.

In the year 1807, in the case of *Naylor* v. *Collinge* (1 Taunt., 19), under a covenant by a trader-lessee to yield up in repair, at the expiration of his lease, "all erections and buildings" already at the date of the lease erected and built, or thereafter to be erected and built, upon the premises demised, buildings *let into the ground*, although erected by the

tenant *for the exclusive purposes of his trade*, were held in accordance with the old law relating to buildings incorporated with the inheritance, confirmed (or at least, recognised and accepted) as that law was by the terms of the covenant, to be included in the covenant, and to be irremovable by the tenant; and in like manner, and for the like reason, in the year 1818, in a case of *Penry* v. *Brown* (2 Sta., 403), under a like covenant by a domestic-lessee, a *verandah let into the ground, although put up by the tenant for ornament merely*, was held to be irremovable by the tenant. It is, moreover, to be particularly noted that in the former of these two last mentioned cases, an exception from the terms of the covenant was allowed in favour of trade in respect of such of the buildings and erections as were made to rest on blocks or patens *without being let into the ground*, an allowance which was in strict accordance both with the letter, and with the spirit of the letter, of Lord Kenyon's decision in *Dean* v. *Allalley*, *supra*, and which seems, therefore, to corroborate, in no slight degree, our principle of subordinating the terms of the agreement to those grand old rules which we derived from our historical deduction. But to proceed,—in the year 1856, in the case of *Burt* v. *Haslett* (18 C.B., 163, and, on appeal, 893), under a covenant by a lessee (who was a linendraper) to yield up at the expiration of his lease the premises demised, together with "all . . . *windows* . . . and other things, . . . affixed or *belonging* thereto, . . . and together also with all . . . *improvements* . . . made upon the premises," a plate-glass front put in by the tenant in place of the old window, although not fastened otherwise than with *wedges*, was held to be included within the scope of the covenant, in consequence of the express words of the covenant, and in particular of the word *windows* occurring therein; and here again, it is of importance to observe that the spirit of Lord Kenyon's decision in *Dean* v. *Allalley* was fully recognised, for the *window*, although intended by the linendraper for the purposes of his trade alone, was as much the exclusive subject of the old law of the strictly agricultural fixtures, as buildings let

into and incorporated with the soil, being in fact an *outer* window, which, like an outer door, is strictly NECESSARY to complete the house, and as being so becomes *instanter* part and parcel of the inheritance, and not removable by the tenant even who has erected it at his own expense, so that notwithstanding all the linendraper's ingenuity, his glass front was in fact caught in our first sieve, irrespectively of his covenant, which only confirmed or recognised our principle. Again, in the case of *Mansfield* v. *Blackburne* (6. Bing. N.C., 426), decided in the year 1840, under a covenant by the trader-lessee of a salt-spring to leave the salt-works (which the same lessee had also agreed to erect) in good repair at the end of his term, it was held that the iron salt pans, as being parcel of the salt works, were included, and were in consequence thereof become, although in their own nature removable, practically irremovable by the tenant, Tindal, C. J., remarking in his judgment in this case with, however, (it seems to us) one gross inaccuracy, as follows:—

"If this had been the ordinary case between landlord and tenant, as to the right of the latter to remove fixtures, or other things erected on the premises, at the end of the term, we should have entertained no doubt but that the salt-pans had been removable by the tenant, as well from the nature and description of their annexation to the freehold, as upon the doctrine laid down by Lord Mansfield in *Lawton* v. *Salmon*, that it would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works; he might very well have said, 'I leave the estate no worse than I found it.' That would be for the encouragement and convenience of trade, and the benefit of the estate."

"But the question before us does not turn upon any general rule of law (*sed quaere*), but upon the interpretation of a positive contract into which the parties have entered with each other, and the point we have to determine is, whether under that contract it was the intention of both parties, that the salt-pans should be left at the determination of the term, or that the tenant should have the power to remove them."

Now, here also, the Chief Justice, although seeming to question our principle, unconsciously regulates his decision, and in fact he decided, in accordance with it. So, again, in the case of *R.* v. *Topping* (1 Maclel. & Y., 544), decided in 1825, in respect of certain smelting-engines, and in the case of *Dumergue* v. *Rumsey* (2 H. & C., 777), decided in 1866, in respect of the fixtures and fittings-up of a music-hall, an express clause in an agreement being held to have defeated (in the one case accidentally, in the other case intentionally) the tenant's right of removal, the fixtures became in consequence thereof instantly and indissolubly united with the inheritance, so as not to be leviable under a *fi. fa.* issued against the lessee. Such is the predominant vivacity or efficacy of the two considerations which we have designated paramount, and such also the readiness with which agreements not opposing coincide with them in their operation, to the utter disregard of every equitable consideration to the contrary.

Before, however, it is possible to maintain the absolute and universal paramouncy of our principle over all private stipulations and agreements whatsoever, it is necessary to inquire and know whether any covenant or agreement which not only does not coincide with it, but which directly aims at superseding or displacing it, has been allowed to, in fact, supersede or displace it. Now, there is the case of *Sumner* v. *Bromilow* (34 L.J. (N.S.), Q.B., 130), decided so recently as the year 1865, in which in a state of circumstances otherwise resembling the case of *Mansfield* v. *Blackburne, supra,* it was held that the salt-pans in question were removable by the tenant who had put them in, and that they were so removable by reason of a difference in the words of the covenant—a difference apparently suggested to the draftsman or conveyancer by the decision in *Mansfield* v. *Blackburne,* being the exception or reservation *in express terms* of the "salt-pans and other removable articles" out of the general scope or operation of the covenant. So that

our cherished principle apparently succumbs, and the old law, it seems, may be displaced in the interests of trade, or, indeed, of any other interest, by the employment of apt words *expressly* (*and not in intention merely*) displacing or defeating it. The hallowed traditions of the past are indeed ever destined, in the natural course of jural development, to yield before the so-called imperative demands of modern life, and the Court of Queen's Bench, in particular, as at present constituted, has always shown more readiness than reluctance to break off from the past. Probably, however, it is better so, certainly it is more in keeping with the strong reality of modern regards to openly and directly recognise, instead of fictitiously ignoring while circuitously accepting, changes of the sort referred to. And at all events we, as mere writers stating what the law actually is, are compelled by this decision to recognise the maxim, *Cuique juri pro se introducto renuntiare licet*, in its free operation in respect of all fixtures, as well those of the ancient as those of the modern class. And yet, even while compelled to admit thus much, who that has followed the course of decision downwards as presented in this article, would hesitate for one instant to agree with us in our view of the desirability and indeed necessity of attributing to the first and second portions of our general rule, if not a paramouncy, at least a paramount importance as indispensable collateral considerations, because exercising an all-powerful influence when not directly, expressly, and laboriously excluded? Our general rule remains therefore, if not altogether unassailable, practically unassailed.

We shall give but one further illustration of the extremely vigorous, and indeed the instantaneous, operation of those first and second portions of our rule, even in spite of covenants and agreements, which might seem to expressly and directly exclude their operation. The case shall be that of *Foley* v. *Addenbrooke* (13 Mee. & W., 174) decided in the year 1844. The covenant in that case was to repair, and yield up in repair "the furnaces, fire-engine, iron works, dwelling-houses, and all other erections, buildings, improve-

ments, and alterations, *EXCEPT the iron work castings, railways, wimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire-engine, iron works, and premises;*" and it was held by the Court of Exchequer that under this covenant the defendants (who were the lessees) had a right to remove "whatever was in the nature of a machine or part of a machine, but not what was in the nature of building, or of *support of buildings although made of iron* (and that in such removal they might disturb such brickwork as was necessary, &c.)" Now what was the reason why *the supports of buildings made of iron* were irremovable, although they were in fact *iron castings*, and as such therefore within the *exception* of the covenant? Why, it was simply the operation meanwhile of the first and second portions of our rule. The iron supports had, in virtue of their application, ceased to be *iron castings* merely, and were become meanwhile indissolubly incorporated with the buildings of which they were the necessary complements.

Doubtless, however, it is true that the great majority of modern fixtures pass readily and at once through both our first and our second sieves, being neither of the strictly agricultural sort, nor yet of a character to chemically unite with the inheritance; and hence probably has arisen the prevalent confusion of thought, to which we have already more than once alluded, of supposing the agreement or covenant to be solely and entirely regulative of the removability or irremovability of the particular fixtures. There are numerous cases of this modern sort; we shall only quote one, or at the most two typical instances of them. One is that of *Elliott* v. *Bishop* (10 Exch., 496, and on appeal, 11 Exch., 113), decided in 1855, where, under a covenant by a building tenant to yield up at the expiration of his term the premises demised, together with all "locks, keys, bars, bolts, marble and other chimney pieces, foot-paces, slabs, *and other fixtures and articles in the nature of fixtures*" put up during the term, it was held that neither the so-called tenant's fixtures nor the so-called trade fixtures

usual in the tenancy and trade of the defendant the sub-lessee (who was a licensed victualler) were included in the covenant, the interpretation of which turned (in the particular circumstances of the case) upon the mere general rules of the interpretation of written documents, according to which (as Mr. Bovill pointed out in his argument) *verba generalia* following upon enumerated particulars are to be construed as *generalia ejusdem generis*, and therewith the case was at an end. So, again, in the case of *Duke of Beaufort* v. *Bates* (31 L.J., N.S., Cha. 487), decided in 1861, the plaintiff being the freeholder, and the defendant an execution creditor of the sub-lessee, it was a mere question of interpretation, the matter in dispute being whether certain "tram-plates" fastened some to iron-sleepers and some to wooden sleepers, resting upon but not dug into the earth floor of a mine, were or were not included in the phrase "ways and roads" contained in a covenant in the lease. And yet even in these cases of apparent simplicity, it would be hazardous (and perhaps untrue) to state that the first and second portions of our principle received no regard; only they were evidently excluded from effective operation. And see *Addenda*, p. xi.

It remains to illustrate our rule of the Law of Fixtures in its application to those *derivative* relations subsisting in the two contending parties to which we have hitherto only alluded; this will complete our present article, from which (as the reader may have observed) we have carefully excluded the law of *ecclesiastical* fixtures, as being of too peculiar and unfamiliar a character to be treated promiscuously with the other classes of fixtures in this general review of the law.

Now the *derivative* relations in question (with the *derivative* rights corresponding to them), are of many sorts, but are chiefly the following:—

(1.) Mortgagee of lessor, or of lessee, (2.) Assignee (or trustee) in bankruptcy of lessor, or of lessee, (3.) Execution-creditor of lessor, or of lessee, (4.) Vendee of lessor, or of lessee, in their various permutations and combinations;

Also (5.) Executor and heir of lessor, or of lessee, (6.) Tenant for life and remainderman or reversioner, and (7.) Outgoing and incoming tenant.

From this enumeration it will appear that we have innovated upon the customary classifications; but we have done so with much carefulness, and from the *bonâ fide* conviction that the innovations will operate as improvements, introducing unity of conception, and abolishing, or at least reducing into their proper relations of subordination, the arbitrary distinctions and arbitrary co-ordinations of previous writers.

Now in respect of all these subordinate matters, there is much less intricacy of matter, and also much less variety of doctrine, than the multitude of the decisions which have been given upon them might naturally make believe. There is indeed a wonderful simplicity or similarity in all of them. And for the purpose of presenting them to the reader in such a way as to make this their character for simplicity and similarity apparent to him, only one small lemma is required in addition to the explanations already given in this article, and this lemma is also itself of so simple a character as to be rather a corollary from those explanations than a substantive assumption added to them. It is this—

It has already appeared that the strictly agricultural fixtures of the old law instantaneously coalesced with the land or realty to which they were annexed; they were therefore, one would *primâ facie* imagine, *an interest in land.* It is, however, commonly said that fixtures are NOT an interest in land within the meaning of the Statute of Frauds, so as to require a note or memorandum in writing under the 4th section of that Statute, and the case of *Hallen* v. *Runder* (1 Cr. M. & R., 266), decided in 1834, is commonly quoted in support of this opinion. But when that case is critically examined, it is seen that the equities involved in it were so strong and many, that they biassed the judges in their decision of it, and induced them to take advantage of the particular—the

very particular—circumstances of the case, in order to ground upon them in the interest of particular justice a distinction which the writer submits was not borne out by general law, holding (as they held), contrary to the very clear and powerful, and withal the learned argument of Mr. Kelly, that as *fixtures* denoted the "tenant's right to remove," a contract to forego that right was not an interest in land within the 4th section of the Statute of Frauds. Now this decision was an acknowledged evasion of the law, and does not therefore, in our opinion, warrant the generality of the conclusion that is frequently, indeed commonly, drawn from it; for that conclusion affects to extend to fixtures in themselves, what was only asserted in *Hallen* v. *Runder* at the most of "a contract to forego the removal of them." If this be so, the quality of *fixtures* in themselves, whether they are real estate or personal estate, remains in truth an open question, and the determination of it is the *lemma* which we must premise.

Now, the principles of the law of fixtures, as developed in this article, would draw a distinction of the following kind—

(1.) That the strictly Agricultural Fixtures of the old law were and are beyond all question an interest in land, and that they are also permanently and indefeasibly so;

(2.) That the Modern Agricultural, the Trade Proper, and the Domestic or Ornamental classes of Fixtures are:—

(*a.*) Some of them, interests in land, defeasible by the act of the tenant who has the right to remove them; while again—

(*b.*) Others of them are chattels pure and simple, and are not even defeasible interests in land.

Further, all the passages which we have cited from the Year Books, and to which we may for present purposes generally refer the reader back, conspire to show that fixtures as well those of the modern as those of the old law, were part and parcel of the frank-tenement or freehold, so long as they continued annexed to it; and that such of them as were annexed by

the landlord (that is to say, by the owner of the freehold) formed indefeasible parts of the freehold, whereas such of them as were put up by the tenant (the strictly agricultural fixtures being always excepted) were defeasible parts of the freehold, but became indefeasible parts of it immediately the time for their removal by the tenant had expired, and he had failed or omitted to remove them. Moreover, the views which are expressed in the Year Books are fully borne out by the subsequent decisions, both early and recent. Thus in the case of *Lee* v. *Risdon* (7 Taunt., 188), decided in 1816, Gibbs (C. J.) spoke as follows:—

"Many of these articles (household fixtures and furniture), though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed, they are a part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which when severed are chattels, but standing are a part of the freehold, certain grates, and the like. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it, and it never, I believe, was heard of, that trover could be afterwards brought."

Again, in the case of *Lyde* v. *Russell* (1 B. & Ad., 394), decided in 1830, Lord Tenterden held that bells hung by a yearly tenant at the sole expense of the tenant himself, but allowed by him to remain fixed to the freehold after the expiration of his term, became the property of the landlord, and did not even when afterwards severed by the landlord resume the character of chattels so as that the tenant might bring trover for them. And in the very recent case of *Pugh* v. *Arton* (8 L.R. Eq., 626), decided by Vice-Chancellor Malins in 1869, it was held that tenant's fixtures cannot be removed after the expiration of the term, and that for that matter it makes no difference whether the lease expires by re-entry on forfeiture, or by effluxion of time.

Now what is there against these opinions? Nothing, but what admits of a ready explanation. First, there is the case of *R.* v. *Londonthorpe* (6 T.R., 377) decided in 1795, where it was held, that a *post windmill* put up by a tenant, but by *express* agreement between the tenant and his landlord made removable at any time by the tenant, and actually let by the tenant to a third party, was not such a tenement or rather was *not a tenement in such occupation* as entitled the tenant who had erected it to a settlement within the meaning of the Poor Laws. Again, there is the case of *R.* v. *Otley* (1 B. & Ad., 161) decided in 1830, where it was held that a *windmill* rented along with other property (the latter property being of an admittedly real character) was not a tenement within the meaning of the Poor Laws for the purpose of helping the pauper to obtaining a settlement under these laws, being a mere superstructure of wood resting by its own weight upon a brick foundation, *no part of its machinery touching either the ground or the foundation.* Now, of both these last mentioned cases, the most obvious remark to make is this, that their exceptional circumstances were the occasion of the question arising at all, and that under ordinary circumstances therefore, windmills and such like fixtures and *à fortiori* fixtures that were more manifestly so, would have been considered, and were in fact customarily considered, tenements or real estate for all purposes, and therefore also for the purpose of conferring a settlement within the meaning of the Poor Laws. And accordingly we find that in the case of *R.* v. *St. Dunstan* (4 B. & C., 6, 86) decided in 1825, it was held that certain fixtures demised to a tenant along with his tenement were held to be parcel of the demise or of the tenement for the purpose of entitling the tenant to such a settlement. And we also find that in the case of *R.* v. *Guest* (7 A. & E., 951), decided in 1838, it was held that machinery fixed in coal and iron mines by the persons, the lessees of the mines, were for the purposes of a poor rate which was being levied upon the mines to be regarded as forming part of

the mines, so as to increase the assessable value of the freehold; but Lord Denman (C.J.), in holding to the effect stated, was careful to add that the question of the essential or abstract quality of the fixtures (whether real or personal estate) was not raised by the case. So, then, it appears that fixtures so far from being clearly not interests in land are in much more danger of being interests in land for all purposes whatsoever, and of being therefore also within the meaning of the Statute of Frauds.

It is necessary, however, to bear in mind the distinction which in a previous part of this article we pointed out as having been recognised in modern times, between the so-called fixtures that are either actually or constructively fixed for at least the time being to the freehold, and those so-called fixtures, which, whether of the Modern Agricultural, or of the Trade Proper, or of the Domestic or Ornamental Class are, and from first to last remain (rightly or abusively) of a purely personal or chattel nature. We have already had examples of this so-called chattel-fixture; we have a further example of such a fixture in the case of *Davis* v. *Jones* (2 B. & A., 165) decided in 1818, where it was held that certain *jibs*, parts of a machine which had been added to the machine by the tenant, a trader-lessee, during his term, and which were capable of being removed again from the machine without damage either to themselves or to it, were goods and chattels for which the outgoing or rather the out*gone* tenant might maintain trover for their non-delivery by the incoming or rather the in*come* tenant upon demand made. Abbott (C.J.), in delivering judgment in the case, adopted the following alternative mode of speech, "If these jibs are to be considered as personal chattels . . . On the other hand, if the jibs are to be considered as annexed to and parcel of the freehold, . . . " a dubiety in his lordship's mind which he ultimately settled by decreeing the jibs to be personal chattels. But the dubiety itself is important to note.

The result, therefore, of all the cases that have been

adduced both *pro* and *contra*, goes to corroborate if not to establish the distinctions to which the principles stated hereinbefore would naturally lead. They are, moreover, distinctions which are indispensable to explain, and (let us add) which of themselves alone are sufficient to explain, the whole course of the subsequent decisions which have been made or had in the matter of those *derivative* rights and *derivative* relations to which we before referred; and surely this, their sufficiency, and this, their indispensability, go far to prove the inherent justice of them; and see also the distinction taken in *Ex parte Astbury*, *infra*. This lemma having been premised, we proceed to a consideration of the cases in detail.

We shall take these derivative relations in the order in which they were stated on a previous page.

In the case of *ex parte Quincey* (1 Atk., 477) decided in 1750, where A was mortgagee of the reversion in a brewhouse, subject to a lease for years granted by the freeholder his mortgagor to B, and where B had purchased the utensils of the brewhouse from his lessor, and had afterwards, and also after the mortgage to A, sold and assigned both the utensils and the lease to C, and when C thereupon or afterwards mortgaged both lease and utensils to D (who was in fact the original freeholder the mortgagor to A), and when D afterwards became bankrupt, it was not indeed held (because no decision was in fact arrived at), but Lord Hardwicke's strong opinion was, that the utensils were not included in the first mortgage, namely, that to A, and that the assignees of D were therefore entitled to them, at least as against A. But of this case our data are scanty, and the circumstances are complex; it may be, therefore, that the particular utensils which were in dispute were (as beyond question they had been treated as being) of a purely chattel character, although indeed it may also be (and but for that treatment of them it would have rather appeared) that they were fixtures of that sort which are a defeasible interest in

land, in which latter case the tendency of Lord Hardwicke's opinion would (as we shall see) be contrary to the declared or express effect of subsequent and more especially of recent decisions, supposing always that B's separate purchase of the utensils may be ignored.

Again, in the case of *Steward* v. *Lombe* (1 Brod. & B., 506), decided in 1820, where A the freeholder mortgaged his land to B for 1000 years, and also in express terms "bargained, sold, and set over" to B a certain windmill erected upon the land but found by a jury not to have been a fixture in the sense of being either a defeasible or an indefeasible interest in the land, and where A the mortgagor continued in possession after the mortgage, and C a judgment creditor of his, issued an execution against him, it was held that C could not take the windmill upon his *fi. fa.*; Dallas (C.J.), distinguishing under the circumstances which have been described, the rights of an execution-creditor from those of an assignee in bankruptcy, a distinction which also differenced that case from the case of *Horn* v. *Baker* (9 East, 215), decided in 1808, where under circumstances otherwise resembling those in *Steward* v. *Lombe supra*, the assignees in bankruptcy were held to have a preferable title to that of an annuitant-mortgagee of the bankrupts; although, indeed in the case of *Horn* v. *Baker supra*, a further distinction was taken, namely, that while the *vats*, &c., which were not fixed to the freehold, passed (as we have said) to the assignees under the bankruptcy, yet the *stills* which were fixed to the freehold did not pass to them under the words of the Statute, "goods and chattels in the apparent ownership or possession of the bankrupt at the date of his bankruptcy," but that all such *stills* had passed as part and parcel of the land or brewhouse to the annuitant-mortgagee under her mortgage deed; and this distinction, as we shall see, has been carefully and invariably observed in all the subsequent decisions admitting of it. *Horn* v. *Baker* is indeed by Mr. Smith in his selection of leading cases, made the leading case upon the subject of this distinction; and it

formed the almost sole ground of decision in respect of the fixed and movable machinery of a mill and iron forge in the case of *Clarke* v. *Crownshaw* (3 B. & Ad., 804), decided in the year 1832, where the like distinction arose, and between the like parties. And see *Addenda*, pp. xi, xii.

Again, in the case of *Buckland* v. *Butterfield* (2 Brod. & B., 54), decided in 1820, where A was lessee for years of a piece of ground and dwelling-house, and as such erected a conservatory, which was attached to, and (as was determined in the case) indefeasibly incorporated with, the dwelling-house, so as not even to be removable by the tenant himself who had erected it, and when A afterwards became bankrupt, and his assignees in bankruptcy claimed to remove the conservatory, it was held by Dallas (C.J.), that the assignees could not remove it as against the lessor the reversioner, and that too even although the bankrupt was himself entitled next in remainder after his lessor to the freehold and inheritance in the premises.

Again, in the case of *ex parte Barclay* (5 De G.M. & G., 411), decided in the year 1855, where A (who was by trade a publican), was lessee of a public house, and of other houses, and deposited by way of equitable mortgage his lease with B, giving at the same time the usual memorandum of deposit, and then afterwards became bankrupt while in possession both of the public house and of the other houses, and also of the trade and tenant's fixtures belonging to them (being the fixtures usual in the trade of a publican), it was held that B as such equitable mortgagee as aforesaid, was entitled to all the said fixtures (both the trade and the tenant's ones) as against the claim of A's assignees in bankruptcy, the fixtures not being (nor any of them being) in the order and disposition of the bankrupt within the meaning of the 125th Section of the Bankrupt Law Consolidation Act, 1845.

Again, in the case of *Mather* v. *Fraser* (2 Kay & J., 536), decided in the month of February, 1856, where A and B (who were copper-roller manufacturers) were the owners in fee and tenants in common of certain land and of the mills

erected thereon, and mortgaged the same to C, and afterwards became bankrupt, it was held by Wood (V.C.), that the mortgage of the land and premises carried with it all the articles let into the soil or fixed to the freehold, whether by screws, solder, or any other permanent means, and that for that matter it made no difference that the purpose to which the land in question was applied by the bankrupts was trade or manufacture and not agriculture; and moreover, that as these fixtures passed as part of the freehold, no registration of them under the Bills of Sale Act (17 & 18 Vic., c. 36), was requisite for the purpose of conferring a complete title to them upon the mortgagees. The assignees in bankruptcy of the mortgagors had therefore no claim whatever as against the mortgagees to any of the fixtures above enumerated, but articles standing by their own weight alone were not to be considered fixtures for the purpose of conferring such a prior right upon the mortgagee, in the absence at least of a properly registered Bill of Sale specially applicable to themselves.

Again, in the case of *Waterfall* v. *Penistone* (6 Q.B., 876), decided in the month of July, 1856, where A (who was a paper-maker) was the owner in fee of a piece of land and of the mill erected upon it, and mortgaged the same with the machinery to B, and afterwards mortgaged the same with the machinery to C, and afterwards by Bill of Sale "bargained, sold, assigned and set over" by way of mortgage to the said C certain machinery erected since the date of the former mortgage to him, and in the same deed also covenanted that the mill and machinery comprised in the said former mortgage to C should be charged in addition with the money advanced upon the said second mortgage to him, and where A afterwards became bankrupt, C not having registered his said second mortgage as a Bill of Sale within the prescribed period of twenty-one days from the date thereof, it was held that the assignees in bankruptcy of A were entitled to the machinery comprised in the said

Bill of Sale, as fixtures of a chattel-nature and which had been treated as such by the parties to the third of the above-mentioned three mortgages, such third mortgage being *primarily* and characteristically or essentially a Bill of Sale, and not a freehold conveyance, notwithstanding the covenant also contained in it.

Again, in the case of *Walmsley* v. *Milne* (7 C.B., N.S., 115), decided in the year 1859, where A (who was a brewer, inn-keeper, and bath proprietor) was owner in fee of a piece of land, and mortgaged it while bare of all erections to B, and afterwards built erections of various sorts upon it, and then B after those erections transferred his mortgage to C, and then A became bankrupt, it was held that the assignees in bankruptcy of A had no claim as against C, the transferee of the mortgage of the land to the said erections, or to any of them, although these erections were put up for the exclusive purposes of the mortgagor's aforesaid trades, being a steam-engine, and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones, and although they were also (or at least some of them were) capable of being removed without injury either to themselves or to the land; and the mortgage deed as it was not in any sense a Bill of Sale, so it required no registration to complete its efficacy, nor was its efficacy affected by the mortgagor's continuing in possession of the land, and of all the said fixtures and things up to the date of his bankruptcy.

Again, in the case of *Cullwick* v. *Swindell* (3 L.R., Eq., 249), decided in the month of December, 1866, where A was owner in fee of a certain dwelling-house, and also of a certain warehouse, and mortgaged the same to B, and then entered into partnership with C, and then A and C, together as such partners in their trade (which was that of iron-merchants), put up certain trade fixtures upon the premises, and afterwards executed a deed under the Bankruptcy Act, 1861, whereby they conveyed all their property to D, for the benefit of their joint and separate creditors, it was held (and chiefly upon the

principle established in a case of *ex parte Cotton*, 2 M.D., & D., 725), that B as such mortgagee as aforesaid was entitled to all the said trade fixtures as against D, notwithstanding their erection subsequently to the date of his mortgage, and in part by a person who was not a party to the mortgage deed.

Again, in the case of *Boyd* v. *Shorrock* (5 L.R., Eq., 72), decided in 1867, where A and B (who were partners in the cotton-manufacturing trade) were lessees for years of a mill and of the machinery demised with it, and also of an adjoining piece of bare land, and erected further machinery and fixtures upon the piece of bare land, and then mortgaged to C the said mill and the machinery demised therewith and "all other machinery, whether fixed or movable then standing and being, or which at any time thereafter during the continuance of the security might be, in and about such last mentioned mill and premises," and then afterwards became bankrupt, the mortgage deed not having been registered as a bill of sale, and A and B having continued in possession up to the date of their bankruptcy, it was held that C was entitled as against the assignees in bankruptcy of A and B to all the machinery (with the fixtures) in and about the mill and premises as well that part of it which was subsequently added by A and B themselves as that part of it which was included in the original demise, and this notwithstanding that the machinery was put into the floors of the mill in such a manner as to admit of its easy removal in an entire state without damage to the freehold of the mill.

Again, in the case of *Climie* v. *Wood* (3 L.R., Exch., 257, and on appeal 4 L.R., Exch., 328), decided in 1868-9, where A was owner in fee of two pieces of land, and mortgaged one of them (hereinafter called Piece No. 1) to B, and afterwards erected an engine-house upon the two pieces of land putting an engine and boiler into it, and afterwards mortgaged the other piece of land (hereinafter called Piece No. 2)

to C, and then executed a Deed of Inspectorship, and afterwards B (under a power contained in his mortgage deed) sold Piece No. 1 to D, it was held that the mortgagees of the two pieces of land and the persons claiming under them by sale or transfer were entitled to the engine and boiler put into the engine-house in preference to the trustees of the Inspectorship Deed, or persons claiming under them by purchase; Kelly (C.B.), who delivered the judgment of the court, saying towards the conclusion of his judgment as follows:—

"The result is that the old maxim of '*Quidquid plantatur solo, solo cedit,*' applies in all its integrity to the relation of mortgagor and mortgagee, and that trade fixtures constitute no exception. It follows from this, that the findings of the jury, that the steam engine and boiler were fixed by the mortgagor *for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold*, become immaterial, for the right of the mortgagee attaching by reason of the annexation to the land, the intention of the mortgagor in respect of them cannot prevail against the legal effect of the deed."

Again, in the case of *ex parte Astbury, ex parte Lloyd's Banking Company, In Re Richards*, (4 L.R., Ch. App., 630), decided in July, 1869, where A (who was an iron manufacturer), was lessee for years of certain rolling mills, and made an equitable mortgage of them by deposit to B, and afterwards became bankrupt, it was held upon a special case stated between the mortgagee B, and the assignees in bankruptcy of A, that (besides the fixed machinery with respect to which no question seems to have arisen) of certain duplicate iron rolls of various sizes made to be fitted into the rolling machines, such of them as had been actually fitted into the rolling machines went to B the mortgagee along with the fixed machinery, while all such as had not yet been used in that way went to the assignees in bankruptcy of A (a distinction or refinement which may probably vary the

decision in such a case as that of *Davis* v. *Jones*, *supra*, should any such case occur in future); and it was also then held, that certain straightening plates were fixtures and passed as such to the mortgagee, but that certain weighing machines were not fixtures, and belonged to the assignees in bankruptcy; Giffard (L.J.), in his judgment, stating as follows:—

"I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor shall be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine."

Again, in the case of *Longbottom* v. *Berry* (39 L.J., N.S., Q.B., 37), decided in December, 1869, where A (who was a woollen cloth manufacturer), was the owner and occupier of a piece of land with the building then erected upon it, and mortgaged the same by equitable deposit to B, and then built a mill upon the land, and fitted up the mill with steam engines and with the other machinery which was necessary for his trade, and then by Bill of Sale assigned to C "all the machinery, fixtures, implements, utensils, effects, and things," mentioned in a schedule, and including in fact, all the machinery and articles in the mill, and then afterwards executed a legal mortgage to B the said equitable mortgagee, it was held that all the machines which were fixed in a quasi-permanent manner to the floor, roof, or side-walls, passed to B under his mortgage, but that those which were merely movable articles passed to C under his bill of sale.

Lastly, in the case of *Tebb* v. *Hodge* (39 L.J., N.S., C.P., 56), decided in November, 1869, where under circumstances of some complexity, a question having arisen between A who alleged himself to be an equitable mortgagee of B on

the one hand and the assignees of B on the other as to the right to certain fittings put up by B, it was held that A was in fact the equitable mortgagee he alleged, and the further decision of the question was left to follow as of course.

Such having been the general course of the decisions in cases primarily affecting mortgagees, and these decisions having also sufficiently illustrated the law as it affects assignees in bankruptcy, and even vendees, and having also partially illustrated the law as it affects execution-creditors, it remains to adduce only one or two more cases affecting execution-creditors before proceeding to the three other divisions (which are as yet untouched) of executor and heir, tenant for life and remainderman, outgoing and incoming tenant.

In *Poole's Case* already cited, a case decided by Holt (C.J.) in the year 1704, it was held that of certain trade fixtures set up by A who was lessee for years of a house in Holborn, such of them as were removable by A, were also seizable in execution by the sheriff upon a *fi. fa.*; but this holding was apparently not to extend to a *pavement*, &c., put into the ground by A, and not removable by him during his tenancy or afterwards.

Again, in the case of *Winn* v. *Ingleby* (5 B. & A., 625), decided in 1822, a distinction was taken in respect of the estate of the execution-debtor in the premises to which the alleged fixtures were attached; and it was held that the sheriff had no right under a *fi. fa.* to seize such fixtures where the house in which they were situated was the freehold of the execution-debtor. It is evident, however, that this distinction has now ceased to be of any practical importance since the Statute 1 & 2 Vict., c. 110, has extended the sphere of the law of execution.

Lastly, in the case of *Minshall* v. *Lloyd* (2 Mee. & Wel., 450), decided in 1837, where A (who was a worker of coal mines) was lessee for years of a colliery subject to a proviso for re-entry on insolvency, and erected certain steam engines,

&c., &c., affixed in the usual manner to the soil, and afterwards assigned the colliery with the engines, &c., to trustees for an annuitant, with a power of sale upon default, and A's lessor afterwards re-entered, the trustees not having then as yet exercised their power of sale, and the sheriff afterwards and before the annuity-trustees had exercised their power of sale, seised the engines and other articles in the colliery under a *fi. fa.* at the suit of an execution-creditor of A, it was held that the annuity-trustees could not recover the steam engines in trover against the sheriff, although the deed of assignment to them was not avoided by their omission to take possession and exercise their power of sale upon A's default in payment of the annuity.

Passing now to the cases which illustrate the law of fixtures as it affects the executor or executors and the heir or heirs of a deceased person, whether lessee or owner in fee of land, it is evident that the heir and the executor equally claim as *volunteers*, and they have therefore neither of them any equity over the other. As between themselves, therefore, the law is plain, that according as the *res principalis* or land goes to the one or to the other of them, so does the *res accessoria* or fixture go to the one or to the other. This explains how it was that in the passage quoted from the Office of Executors on a previous page, the fixtures although part of the house went to the executor; for there the house was leasehold. But the exceptional character of the passage referred to only proves and corroborates the general rule (as it is to be extracted from the cases), namely, that where the deceased is the owner in fee, there the fixtures which are such (being as they must be *indefeasible* parts of the inheritance) go to the heir and not to the executor, and only those things which are not fixtures in any proper sense, either actual or constructive, but which are and continue mere personal chattels, go to the executor and not to the heir.

This rule, it is true, appears in certain cases to have been departed from, or even violated; and the case of *Squire* v. *Mayer*

(Freem., 249), decided in 1701 is an instance in point. It was there held that a furnace though fixed to the freehold, and although purchased with the house, and also hangings nailed to the walls should go to the executor, and not to the heir—a determination stated to have been contrary to Herlakenden's Case (4 Co.), meaning to the case of *Warner* v. *Fleetwood* already quoted. But of this case two possible explanations may be given; either (1.) That the purchase of the house and the purchase of the furnace, although the two purchases were made at one and the same time, were essentially distinct transactions, and had been treated as such by the deceased, who had therefore by his treatment of them both at the time of the purchase and afterwards up to the date of his death, prevented that coalescence of the fixture with the freehold which would otherwise have naturally followed; or, (2.) That the fixtures in question in the case were of a peculiarly expensive and *unnecessary* sort, and had exhausted the personal estate in an excessive degree, so as that there was a strong equity of creditors or of other persons calling for a mitigation of the rule. Either of the two explanations just given would also, it is clear, explain the decision in the *Cyder-mill Case, supra*, supposing that decision to have been rightly given. Perhaps, however, the latter explanation is the more likely one of the two; for the rule of the law of fixtures as between heir and executor, as before expressed, must be taken to be subject to this partial mitigation, a mitigation moreover which may be thought to be peculiarly in keeping with the spirit of modern times, for there may now be as much waste of personal as there was formerly of real estate. Possibly, however, neither of the two explanations which we have suggested removes the discrepancy; and if so, then the discrepancy must remain, but the practical effect of the decision or decisions may be regarded as *nil*, so far as they would discredit the general rule before expressed.

The case of *Cave* v. *Cave* (3 Vern., 508), decided in 1705, is an authority in support of that rule; for it was

there held that pictures and glasses put up instead of wainscot or where wainscot would otherwise have been put, should go to the heir and not to the executor. There is, however, a case of *Harvey* v. *Harvey* (2 Str., 1141), decided in 1741, in which it was held (in apparent contradiction to *Cave* v. *Cave*), that hangings, tapestry, and iron backs to chimneys should go to the executors and not to the heir; it may, however, be remarked of this case, that we know neither whether the principal building was leasehold, nor in what manner the fixtures in question were put up, or whether they were not in fact duplicates not yet put in use, or old used-up articles which had ceased to be in use, any one of which circumstances would sufficiently account for the apparent contrariety.

In this conflict of the early authorities, we gladly resort to the more modern decisions, and in particular to the typical case of *Fisher* v. *Dixon*, a decision which is entirely in favour of the heir as against the executor to the extent of our general principle, that that one of the two conflicting parties who takes the house, should also take such of the fittings or furnishings of the house as are necessary to complete the conception of it as a properly habitable abode. This decision has, moreover, been so frequently followed and so frequently referred to *supra*, that it may here stand alone and supersede the necessity of a detailed statement of or reference to the other modern decisions.

Passing next to the cases which affect the relation between tenant for life and remainderman or reversioner; here it is evident that the heir shall have nothing as against the remainderman or reversioner, for that the land in virtue of which the heir's claim (if he had any claim) would arise has passed from him to the next person in the succession, and this latter person becomes substituted for him, just as a devisee or other successor might have been. And this substitution having been once effected, do not the persons, the respective claimants, namely, the remainderman or reversioner and the executor of the deceased tenant for life

or in tail, appear before us as volunteers equally as the heir and the executor did on a former occasion? The mitigation which was allowed in favour of the executor on that occasion would also be allowed in his favour on this occasion, yet with perhaps less readiness of indulgence; for in this latter case, the executor's testator, not having been himself the full or sole owner of the land, or indeed the owner of it at all, but holding rather in virtue of the ownership of the person who created the entail or settlement, would be obnoxious to the rule which we have already quoted from the "Institutes of Justinian," that he who builds upon another man's ground, knowing that it is another man's, must be taken to build for the good of the land, and not of himself. Now these principles, so far as they relate to buildings and the necessary completions of buildings, are entirely borne out by the very carefully considered decision which was pronounced by Lord Romilly in the case of *D'Eyncourt* v. *Gregory*, to which we have so often referred, and to which we need here do nothing more than refer again.

The case of *Dudley* v. *Warde* (Amb. 113), decided so early as 1751, is an illustration of the MITIGATION in favour of the executor to which we have alluded; and just as *D'Eyncourt* v. *Gregory* furnishes us with the principle of the general rule, so *Dudley* v. *Warde* may be said to furnish the principle of that mitigation, in other words of the limitation of the rule, for it was held in the latter of these two cases, and clearly upon the old and now familiar principle of favouring trade, that a furnace erected in a colliery by a tenant for life (or in tail), went on the death of such tenant to his executor, and not to the remainderman. Now, it is clear that this decision was necessary for the purposes of encouraging trade generally, by the assurance which it gave to tenants for life under similar circumstances of their personal estate being re-couped after their death, the extraordinary disbursements which it should

have been put unto during their life by reason of the imperative necessities of trade; nor is it at all in conflict with the case of *D'Eyncourt* v. *Gregory* above referred to; indeed the principle of the reconciliation of the two cases is afforded by the case of *Dudley* v. *Warde* itself in the distinction which was there taken between the particular fire-engine which has been mentioned, and two other like engines mentioned in the case, and therein stated to have been left to go to the remainderman rather than to the executor, contrary to the letter at least, if not to the spirit, of the decision in *Squire* v. *Mayer*, *supra*—the latter two engines having been put up and left by a tenant-in-tail, whose estate had preceded that of the last deceased tenant, so that they had in fact already coalesced with the inheritance at the time the inheritance devolved upon the deceased.

Lastly, the relation of out*gone* to in*come* tenant is one which follows as a natural deduction or corollary from the principles we have established. In examiniug this relation, the first point to be considered in connection with it is this,—the precise state of matters existing between the out*gone* tenant and his landlord at the time of the outgoing of the former. If there be nothing special in that relation, then the outgone tenant immediately he is outgone, ceases to have any right to the fixtures, whether defeasible or indefeasible interests in land which he may during his term have set up; and the in*come* tenant therefore takes the land *plus* all these fixtures, and is entitled to hold them for the term of his tenancy without interference from anyone, whether landlord or out*gone* tenant. The in*come* tenant has not, however, any property or interest in them as fixtures; but his interest in them so far as it extends, is an interest which arises under the *demise*, the fixtures being already become at the date of the demise part and parcel of the inheritance. Again, if any special stipulation or agreement has been entered into between the incoming tenant and the outgoing one, and that agreement or stipulation has been entered into with the con-

currence or knowledge and assent (actual or constructive) of the landlord, then the terms of that stipulation so far as they modify the landlord's legal rights will as a matter of course bind the landlord, and so will regulate the relation between the out*gone* and the in*come* tenants. It would be a mistake, however, to suppose that whatever binds the landlord personally will also bind the income tenant, for the rule, as we shall shortly see, is often all the other way. But it is desirable to note in this place, and to note carefully, that it is through the intermediation of the landlord between the outgoing and the incoming tenants that the relation subsisting between these two latter becomes *derivative*, as we have described it, for indeed their landlord is to them what (roughly speaking) the ancestor is to the executor and heir, or what the settlor is to the persons the successive tenants for life or in tail under the settlement. But along with this rough or general resemblance, there are certain differences of minor yet of essential importance in the relation of outgoing and incoming tenant, which necessitate the more particular consideration of that relation and of the incidents thereto. This more particular consideration will also form a conclusion to this treatise that is as natural and fitting as it is indispensable to the completeness of it.

The question before us is this—what right the outgone tenant has (and whether as against the landlord or the income tenant) to recover fixtures or chattel fixtures after the expiration of his term, and in what way may he assert that right, or by what remedy enforce it, where it is questioned or withheld? Now, four cases in particular have been decided upon this question, or some part of it, namely, *Penton* v. *Robart*, in 1801; *Weston* v. *Woodcock*, in 1840; *Roffey* v. *Henderson*, in 1851; and *Leader* v. *Homewood*, in 1858; and our question must find its answer from these cases. The cases are, however, found upon examination to be slightly different or contrary in the tendencies or effects of their decisions, the first of the four seeming to establish or at least

to favour a laxer and apparently more liberal rule, the latter three a stricter and apparently more rigorous one. A closer scrutiny of their details is therefore necessary, but this scrutiny of contrary instances will, in accordance with the familiar rule of science, should at least the decisions be (as we are bound to assume they are) themselves correct, result in the ready and simultaneous evolution both of the rule and of the necessary exceptions or limitations to it.

The facts of the case of *Penton* v. *Robart* (2 East, 88) were these—Penton had demised to X, and X's executors had underlet to Y, part of the land demised, and Y had underlet to Robart, with permission from Y to Robart to erect a building for the purpose of making varnish. Penton gave X's executors notice to quit, and in accordance with or at least in consequence of that notice the term of the original demise expired at Michaelmas, 1800. Penton also recovered in ejectment against Robart, but Robart, notwithstanding, remained in possession after Michaelmas, 1800, and after the recovery in ejectment, and while so remaining in possession he pulled down the wooden superstructure of the varnish house, leaving, however, the substructure of brick, and he also (while so remaining in possession) carried away the materials of the wooden superstructure. For these acts (both for continuing in possession after the expiration of the original term, and after the ejectment, and for pulling down and removing the wooden part of the varnish house), Penton brought trespass against Robart for breaking and entering his yard, &c., and there, without the leave or licence of the plaintiff, pulling to pieces the said varnish house, and carrying away certain timbers, &c., and disposing thereof to his, the defendant's, use. Robart, so far as related to the trespass for breaking and entering the plaintiff's yard, confessed the same, and let judgment go by default, but so far as related to the removal of the wooden superstructure of the varnish house, contended that he had a right to take down and remove that. And Lord Kenyon, regarding this

superstructure as analogous to any engine or other loose machine which was only steadied by, or made to rest upon, the brick foundation or substructure, decreed its removability on the ground of the favour shown to trade; and Mr. Justice Lawrance drew this very convenient distinction — Robart admits that he was a trespasser in coming upon, or continuing upon, the land, but he contends that he was not a trespasser *de bonis asportatis*. And accordingly a verdict was found for the plaintiff, as to the trespass in breaking and entering, with 1*s*. damages, and for the defendant as to all the rest of the trespass.

The facts of the case of *Weeton* v. *Woodcock* (7 Mee. and W., 14), were these—Plaintiff had demised to X a cotton factory, with the warehouse, engine, and engine house, furniture, implements, and machinery, for the term of seven years from May 12, 1836, subject to determination on the bankruptcy of X, and with a covenant by X to keep up a good steam engine and boiler, and to leave the same to plaintiff in good repair at the end of his tenancy, otherwise to pay the value thereof. X was made a bankrupt on April 16, 1838, and the defendants having been appointed his assignees took possession of the premises in that capacity, and then afterwards the plaintiff made an entry on the premises on May 30, 1838, under the forfeiture clause in the lease, the assignees nevertheless continuing in possession, but not having meanwhile, nor until June 20, 1838, sold (although on the last mentioned day they sold), the steam engine boiler, which was the subject of dispute in the case. The plaintiff now brought trover to recover the boiler, or its value, against the assignees. Mr. B. Alderson, in giving judgment, said—

"The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. [But not longer.] In the present

case, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants. And further, even if they had the right, in a case where the entry determining the tenancy is the act of a THIRD person, to consider themselves entitled to a reasonable time for removing the fixture, the jury have found that they did not avail themselves of that privilege."

And the plaintiff was accordingly held entitled to recover.

The facts of the case of *Roffey* v. *Henderson* (17 Q.B., 574) were these—Bowler had leased to plaintiff certain premises for a term of twenty-one years, and had afterwards, and before the expiration of such term, sold to plaintiff certain personal chattels belonging to Bowler, fixed and fastened to the said premises, and being (among others) bell-pulls, cranks, hooks, hat-pins, blinds, ranges, ovens, stoves, boilers, shelves, closets, and dressers. Then towards the expiration of plaintiff's term, Bowler wrote a letter to him, at his request, giving him permission (as plaintiff alleged) to continue all the said fixtures or fastened chattels in their unsevered state after the expiration of the term, for the purpose of enabling plaintiff to sell the same to the incoming tenant, if the latter should wish to purchase them, and if not, then for the purpose of enabling plaintiff to enter upon the expiration of the term, and disannex and remove all the said fixtures and fastened chattels. And the articles in question accordingly remained unsevered at the end of plaintiff's term, and defendant became, in due course, his next successor in the tenancy, under a lease by deed from Bowler; but defendant refused to purchase the said articles, or any of them, or to permit the plaintiff to enter upon the premises for the purpose of disannexing and removing the said fixtures, or any of them. And the plaintiff accordingly brought trover to recover them against the defendant. But the Court of Queen's Bench rejected plaintiff's claim. Mr. J. Pattison thought Bowler's letter insufficient as a license to plaintiff to enter and remove the articles, appearing (for he thought it appeared) to amount

to no more than saying, "Make what bargain you can with the incoming tenant." It was, moreover (he said), intended to have a prospective operation, and could therefore (not being by deed) have no effect, beyond at the most, personally binding the landlord (Bowler) to make such a bargain with his incoming tenant as should be consistent with the plaintiff's just expectations under the letter of license to him. At all events, it could not bind the incoming tenant, the defendant, in any way. And then again (he proceeded), it not appearing that these articles had been disannexed from the freehold, and the presumption, therefore, being that they had continued annexed, trover did not lie for them. Mr. J. Coleridge and Mr. J. Wightman delivered judgments to the same effect. So that plaintiff failed, and apparently in respect of all the articles before enumerated, as well those which were fixtures proper as those which were fastened chattels.

The facts of the case of *Leader* v. *Homewood* (5 C.B. N.S., 546), were these—The plaintiff was lessee of premises in Mount Street, Lambeth, for a term which would expire at Michaelmas, 1857. In the month of January, 1857, and onwards to the month of June in the same year, the plaintiff and his landlord had been interchanging communications with each other as to a renewal of the lease, but after the latter date, all such communications were broken off, the landlord having by that time definitely refused to grant a renewal. The plaintiff then suffered his term to expire, not having meanwhile removed certain kitchen ranges and other fixtures and effects, which were the subject of the present action; he, moreover, declined giving up possession, and required first to be served with a demand of the premises, under s. 213 of the Common Law Procedure Act, 1852. On the day after service of this demand, he proceeded to quit the premises, and to remove the articles in question, some of which were naturally mere goods and chattels, while others of them were fixtures, part of the latter having been duly disannexed, part of them still remaining annexed. On the

evening of the day following the last mentioned day, the plaintiff came with a van to his old premises for the purpose of removing these goods and chattels and fixtures, but he found the door fastened. The defendant, however, was upon the premises, being at the time in possession as intending lessee of the whole under an agreement for a lease from the landlord, and having indeed also been until Michaelmas, 1857, in possession of part of the premises as sub-lessee of plaintiff. The defendant, however, refused to admit plaintiff, or to allow him to remove any part of the goods or chattels, or of the fixtures, whether annexed or disannexed. And plaintiff, for this refusal on defendant's part, brought an action against defendant for converting and detaining the articles in question. The jury found that plaintiff had not abandoned the goods, and that defendant had been guilty of a conversion of them; and they returned a verdict for plaintiff, damages 117*l.* The defendant in accordance with leave reserved at the trial, afterwards moved to enter a verdict for him, or a nonsuit, or to reduce the damages, if the Court should be of opinion that the plaintiff was not entitled to recover in respect of those of the fixtures which had remained annexed or unsevered. And upon the hearing of this motion, the Court, after taking time to consider, delivered judgment for the defendant as to all such unsevered fixtures. Mr. Justice Willes observing as follows :—

"The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called 'tenant's fixtures,' is by no means clearly settled. According to the older authorities, the rule was, that he must sever them during the term. But in *Penton* v. *Robart* (2 East., 88), it appears to have been considered that the severance might be made even after the expiration of the tenant's interest, if he has not quitted possession. However, in *Weeton* v. *Woodcock* (7 M. & W., 14), the rule was laid down that the tenant's right continues only during his original term, and 'such further period of possession by him as he holds the premises under a right still to consider himself as tenant.' It

is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the agreement relied on by the counsel for the plaintiff in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures: and that consequently the verdict of the jury, which has negatived any such intention, is conclusive in his favour. But it is unnecessary to consider the import of the rule with reference to the right of a tenant at sufferance during the continuance of such tenancy, because in the present case, the landlord had re-entered, and thereby put an end to the tenancy, before the plaintiff attempted to enforce his right. He cannot, therefore, sustain any claim for damages in respect of the defendant's having prevented him from severing the fixtures; for at that time the plaintiff had ceased to be a tenant of any kind, or to hold the premises under any right still to consider himself as such."

Now upon this statement of these four cases, it appears, upon a comparison of the several judgments delivered in them, limited as those judgments must be by the particular circumstances of the cases to which they respectively belong,—

(1.) That in actions against an outgone tenant by his late landlord (such as were the actions in *Penton* v. *Robart* and *Weeton* v. *Woodcock*), the tenant may safely keep, as against his landlord, the fixtures which he has recovered *quocumque modo*, even although such recovery has been effected after the expiration of his term, in all cases where that expiration has been occasioned consequentially upon the premature or unexpected determination of the tenancy or estate of his lessor, and without his act, or without his knowledge, because in every such case the ex-tenant's liability in trespass for entering upon the land of his late landlord is nominal merely, giving (as it gave in *Penton* v. *Robart*) one shilling or one farthing damages only; but the tenant may not safely

keep as against his landlord, nor can he at all recover as against the latter, much less as against the income tenant his successor, fixtures which have remained dissevered after the expiration of his term in any case where that expiration has been occasioned through his act or with his knowledge (*Weeton* v. *Woodcock*).

(2.) That in actions by the outgone tenant against an income one (such as were the actions in *Roffey* v. *Henderson* and *Leader* v. *Homewood*), the outgone tenant cannot recover fixtures against the income tenant to the prejudice of the latter in cases where the articles (whether they be fixtures proper or simple chattels) have remained unsevered after the expiration of the full period of the tenancy, in any case at least where the income tenant had no notice of the outgone tenant's right or claim (*Roffey* v. *Henderson*), or, but in respect alone of fixtures properly so called, in cases even where the income tenant (as was the case in *Leader* v. *Homewood*) had full notice of such right or claim, the equity of notice in these latter cases not being sufficient to rebut the conclusiveness of the legal presumption to the contrary, although doubtless in this latter class of cases, the outgone tenant may upon effecting either a peaceable entry (if he can), or a legal entry (if need be), remove all such loose goods, and chattels, and severed fixtures as have remained upon the land, his late demise. For it seems that in respect of all these last mentioned articles, the legal presumption of their abandonment for his landlord's use does not arise, and if the landlord (or his income tenant) should convert them in any way, he will be liable as for a tortious conversion of them, and his only safety, therefore, is to put the articles in question in the street, or in the king's highway, and in that manner by a somewhat harsh yet necessary act to invoke the law for his protection and relief. For it seems that the retention of the articles with knowledge is always critical to the income tenant, as it had nearly proved in the case of *Roffey* v. *Henderson*, and would have proved

in that case but for the difficulty of bringing home conversion upon him, and but for the technical insufficiency of the pleadings, which enabled him to escape.

It appears, therefore, as a result of the comparison of these four cases, taken in connection with the preceding portions of this article, that there is a regular gradation among fixtures, using that word in its widest sense, in respect, at least, of their after-removability or after non-removability by an outgone tenant, and that that gradation is threefold, namely:—

(1.) Fixtures of the old agricultural sort which, instantly they are annexed, are indefeasibly annexed, and with regard to which the presumption of their after-non-removability is absolute or conclusive from the first.

(2.) Fixtures of the modern sort (whether agricultural, trade-proper, or domestic) which are only defeasibly annexed during all the period of the tenancy, and with regard to which the presumption of their after-non-removability is rebuttable during all the period of the tenancy, becoming conclusive only when, and not until, the tenancy, and what may, and has, been called the reasonable "excrescence"* of it, have expired; and for the matter of the after-non-removability of these fixtures, it matters not how slightly they are annexed, provided they are to some degree annexed.

(3.) Fixtures improperly so called, which visibly are not annexed even in the slightest measure, whether defeasibly or indefeasibly, actually or constructively, to the land, and with regard to which the presumption of their abandonment by the tenant does not arise at all from the mere circumstance, at least, of their non-removal by him within the period of the tenancy, and its excrescence, or indeed (as it rather appears) within any period, however long, after the expiration of the tenancy.

Or, to express the same result in other words, and more briefly,—It appears, that with regard to the question of the after-removability or after-non-removability of fixtures by an

* See *Macintosh* v. *Trotter*, 3 Mee. & W., 184.

outgone tenant, there is a regular gradation of presumptions from the absolutely and instantly conclusive presumption of after-non-removability which prevails in respect of the strictly agricultural class of fixtures, through the relatively and terminably rebuttable presumption of removability which prevails in respect of our first subdivision of the modern class of fixtures (whether of the mixed agricultural, of the trade proper, or of the domestic or ornamental species), downwards to the absolutely conclusive presumption of after-removability which prevails in respect of the second subdivision of the modern class. And it appears, therefore, that trover will always, under all circumstances, lie for fixtures of this second subdivision (*Davis* v. *Jones*, *supra*, *et passim*,) and will lie under special circumstances for fixtures of the former subdivision (*Penton* v. *Robart*, *supra*, *et passim*) of the modern class, but will not lie for this latter species of fixtures where the circumstances of the case are not exceptional but usual (*Lee* v. *Risdon*, *supra*, *et passim*), and will in no case lie for fixtures of the old agricultural class, which are either strictly agricultural, or barely necessary and complemental. And we have seen, accordingly, that the dispute (when any dispute arises) regarding the after-removability of fixtures centres really in this preliminary question, namely: What is the character of the particular fixtures, or of some of them? But this question, we submit, can only be safely and confidently answered by the application of those principles which we have attempted in this article to evolve and to elucidate.

In finally leaving this subject, we propose to give one last consideration to the case of *Dean* v. *Allalley* (3 Esp., 11, *et supra*), decided in 1799, and to compare it with, and justify it by, the cases of *West* v. *Blakeway* (2 M. and Gr., 729), decided in 1841, and *Budder* v. *Trinidad Petroleum Company* (17 W.R., 153), decided in 1869; these two latter cases seeming to be contradictory to the former and earlier one, and yet being readily reconcilable with it. Their reconciliation will go far, we think, to justify the historical method

we have adopted, besides also recommending to practical lawyers the views herein expressed; for although that method and those views may seem either to be inapplicable to the cases commonly arising, or to be rather philosophical and subtle than correct, yet a familiarity with the method will be found to make it practically serviceable, and an acquaintance with those views, and with the manner of their evolution, is indispensable to every one who seeks to fully understand the decisions of our English judges, who habitually veil, under a most deceptive simplicity of language and of style, the highly abstract principles, and the elaborate method, underlying and moulding their decisions.

The case of *Dean* v. *Allalley* need not for the purpose of this comparison be more accurately set forth than it is already set forth on page 20 *supra.*

The facts of the case of *West* v. *Blakeway* were these—The plaintiff's testator was lessee for years of certain tenements, and granted an underlease of the same tenements, or of part of them, to the defendant, who, on his part, covenanted to repair the premises demised to him, *and all erections and improvements* which should be erected or made upon the same during the term of his underlease, and at the end, or other the determination of such term, to peaceably yield up to the testator, his executors, administrators, or assigns, the demised premises, and all such future buildings and improvements, together with the several fixtures enumerated in a schedule, and together also with all wainscots, &c., &c., and other things fixed or fastened, or which during the term of the said underlease might be erected, or set up, in or upon, or affixed or fastened to, the demised premises, or any part thereof.

The plaintiff brought the present action against the defendant for an alleged breach of his covenant to repair, and to leave the demised premises, and the future buildings, and improvements thereon, in repair, and for that he suffered and permitted a certain erection and improvement, to wit,

a certain greenhouse, which, during the term of the said underlease, had been erected upon the demised premises, to be pulled down and prostrated, and the materials thereof to be wholly removed from off the premises, contrary to the form and effect of his said covenant.

The plaintiff appears to have recovered damages for the non-repair almost as a matter of course, the disputed part of his case being the alleged tortious removal of the greenhouse. Now, in respect of this greenhouse, it appeared that defendant (being himself an under-lessee) had underlet the premises to X, and X had underlet them to Y, and Y to Z, and that Z, or some still remoter under-lessee of the premises, had erected the greenhouse in question, having first had some correspondence with the plaintiff's testator about it, and, in the course of it, having received from the latter a letter which Z interpreted as a license to put up, and afterwards, at pleasure, to remove the said greenhouse.

The greenhouse was built of wood on a frame, and rested on a plank of wood (called a plate), which was laid upon mortar placed in the indents of a dwarf wall, which Z had erected for the front of the greenhouse, the sides consisting apparently of similar walls also erected by Z, and the back being formed by an old wall.

Z removed this greenhouse before the expiration of his term, leaving the walls and ground flues, and doing no injury to the premises.

Chief Justice Tindall left it to the jury to say, whether the greenhouse was an erection or improvement within the meaning of the covenant, and whether the plaintiff's testator had assented to Z's claim to remove it. The jury found for the defendant, and on a subsequent day, upon the hearing of a rule for judgment *non obstante veredicto* obtained by the plaintiff, Chief Justice Tindall reversed the finding of the jury upon the merely technical ground, however, that the informal letter of licence, not being under seal, could not discharge an obligation contracted by deed

under seal, although if the lessor (the plaintiff's testator) had himself occasioned the breach, he could not (neither could his executor) have taken advantage of it; and with respect to the other point, the judges of the Common Pleas were unanimously of opinion, that the greenhouse came within the description "erections and improvements" contained in the covenant, a description which they thought had been purposely adopted to exclude all question of fixture or no fixture.

Now, surely the mere statement of this case in its particular circumstances effectually removes and dispels the objection that it is contradictory to the spirit of the decision of Lord Kenyon in *Dean* v. *Alialley*, or to the spirit of the dictum of the same judge in *Penton* v. *Robart*, *supra*. Moreover, a further reason for regarding it as entirely reconcilable, both with that dictum and with that decision, will be given *infra* at the conclusion of our statement of the next and only remaining case, that of *Bidder* v. *Trinidad Petroleum Company*.

Of this last mentioned case, the facts were these:—

X (who was an oil-refiner) was lessee of premises at North Woolwich for a term of ninety-nine years, from December 25, 1862, subject to certain covenants, the purport of which were:—

(1.) To complete certain partially erected buildings, and to erect certain other buildings in a substantial manner, and at a cost altogether of not less than 2500*l*.

(2.) To keep in repair, and at the end of the term to deliver up, the same, together with all the doors, wainscots, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, foot, paces, slabs, wings, window-sashes, shutters, partitions, *pumps*, *pipes*, *cisterns*, *and other things* which then were or at any time should be fixed or fastened to the freehold of the said premises or belonging thereto.

The defendants (who were an oil refining company) be-

came entitled at a date subsequent to August 23, 1865, to the said premises for the residue of the term then remaining therein, and subject to the same or the like covenants, and the plaintiff at a still more subsequent date purchased the freehold interest therein subject to the lease.

The company's business proving unsuccessful, they attempted to sell their interest in the lease, and did actually sell some of the fixtures, in particular, "some boilers fitted with pumps and supported with brickwork," also other machinery fitted up in like manner, the removal of which was impossible without displacing the brickwork, and otherwise dismantling parts of the buildings.

The plaintiff accordingly applied for and obtained an injunction against the removal of these particular fixtures; and at the hearing, upon motion for a decree, the Master of the Rolls delivered judgment to the following effect:—

"It is admitted by the plaintiff that the fixtures in dispute are trade fixtures, and that as such they are removable by the company, unless the company have contracted themselves out of their rights. The question turns upon the construction of a lease. [His Lordship then pointed out several expressions in the lease which he said were adverse to the company's claim to remove the articles in question, and then continued] These are, moreover, the things which the company has undertaken to leave in repair at the end of the term. In my opinion, the company is not entitled to remove these articles. The question is one of construction entirely, and not of Common Law."

Now, clearly, this case of *Bidder* v. *The Company* is antagonistic to that of *Dean* v. *Allalley*, for Lord Kenyon refused to regard the question involved in the latter case as one of construction merely, and regarded it rather as one of Common Law, doing even an apparent violence to the verbal or literal interpretation in his determination to vindicate the rights of trade as existing at Common Law. And yet the reconciliation of the two cases does not seem to be far to seek. Let it be considered merely

that a space of seventy years separates the two decisions, and that those years have been years in which trade has not only been the pillar of the state, but the all in all of it, in which, therefore, (and during the latter part of it especially) the question of the rights and claims of trade have been expressly brought before, and kept before, the mind of the conveyancer and draftsman, whereas, at the date of the conveyance in *Dean* v. *Allalley*, the interests of land in its simple capacity of land were as yet exclusively considered, and those of trade were not as yet so much as once regarded, or if regarded, regarded so indistinctly as not to be provided for. And in this way, the Common Law, not having been purposely shut out, had room to enter in these olden times; but it is all the other way in these modern times, as the painful enumeration of particulars in the covenant we have set forth in *Bidder* v. *The Company* peculiarly shews; for there, in truth, as Lord Romilly observed, the company had contracted away their rights at Common Law. This explanation is also applicable to the case of *West* v. *Blakeway*, *supra*. And in this way, and from these three cases, we find that contrary and seeming contradictory cases may be consentient, when viewed from the different standpoint which time or other circumstance recommends or necessitates—a crowning vindication of the value of our historical method of research.

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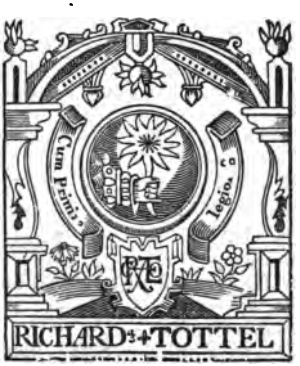

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